United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

76-7004 & 7130

UNITED STATES COURT OF APPEALS
FILED
MAY 24 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JUNIA E. RAAB,

Plaintiff-Appellant,

v.

TABER INSTRUMENT CORPORATION, a New York Corporation, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, WARREN J. HILDEBRANDT, CINDY R. TABER and MARINE MIDLAND BANK—WESTERN, Executors of RALPH F. TABER, Deceased,

Defendants-Appellees.

APPEALS FROM JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK AT CIVIL ACTION NO. 1967-190.

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

INDEX.

page

Docket Entries.................................. 1
Complaint....................................... 13
Summons... 21
Answer of Defendants Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt.............................. 22
Answer of Defendant, Joseph P. D'Angelo.......... 30
Note of Issue................................... 39
Notice of possible order of dismissal under Local Rule 11.............................. 43
Order (Staying dismissal until June 12, 1970 and ordering status report at that time)........ 44
Plaintiff's subpoena deposition to McDonough..... 46
Plaintiff's Notice to Take Deposition of Charles J. McDonough...................... 48
Letter to court from James Heffernan............ 50
Order (Case removed from dismissal calendar)..... 52
Transcript of Deposition of Charles J. McDonough. 53
Defendant's notice to take deposition of plaintiff.................................... 81
Note of Issue................................... 82
Order Permitting Plaintiff to Serve and File Note of Issue for March 9, 1971, Term of Court, With Annexed Affidavit of David L. Sweet.... 84
Note of Issue................................... 87
Notice of pretrial conference on April 2, 1971... 89
Order re Further Depositions.................... 91
Note of Issue................................... 93
Notice of pretrial conference on August 17, 1972. 96
Notice of pretrial conference on December 13, 1972................................... 98
Notice of pretrial conference on February 7, 1973................................... 100
Pretrial statement - plaintiffs Less & Raab...... 101
Pretrial statement - defendants TIC *et al*........ 113

II.

page

Notice of pretrial conference on March 13, 1973.. 117

Notice of status report on February 7, 1974...... 118

Notice of Motion by Plaintiffs Joseph F. Less and Junia E. Raab for Consolidation............. 119

Affidavit of Charles McDonough in opposition to motion to consolidate....................... 128

Notice of Substitution of Falk, Siemer, Glick, Tuppen and Maloney as Attorneys for Estate of Ralph F. Taber......................... 131

Letter from Sweet withdrawing motion for consolidation................................. 135

Memorandum of points and authorities of defendant (Est. of Ralph F. Taber) in opposition to motion to consolidate...................... 138

Notice of meeting with court on April 29, 1974... 162

Letter from Clerk directing McDonough to secure alternate counsel and setting next pretrial meeting for June 3, 1974...................... 163

Order That Less v. Taber Instrument Corp. et al. Should Proceed First and That Raab v. Taber Instrument Corp. et al. Be Deferred Until After the Less Trial........................ 164

Letter from Clerk setting pretrial meeting for September 24, 1974......................... 167

Notice of pretrial conference on March 19, 1975.. 168

Transcript of Proceedings Held March 19, 1975.... 169

Order Granting Defense Counsel Leave To Take Further Discovery........................ 184

Motion to Dismiss, By Defendants Taber Instrument Corporation and Estate of Ralph F. Taber.... 187

Motion By Defendants Taber Instrument Corporation to Adjourn Discovery Schedule................ 189

Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss............ 191

Affidavit of Deanne C. Siemer..................... 227

Order Adjourning Discovery Schedule.............. 237

page

Letter From Victor Fuzak joining in motion to dismiss.................................... 240

Letter From Ross L. Runfola, Attorney For Benjamin J. Manasen............................ 241

Letter From Phillips, Lytle, Hitchcock, Blaine & Huber, Attorneys For Joseph P. D'Angelo 242

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.......................... 243

Affidavit of James P. Heffernan in Opposition to Motion to Dismiss.......................... 287

Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss.......................... 299

Reply Memorandum of Defendants Taber Instrument Corporation and Estate of Ralph F. Taber..... 307

Supplemental Affidavit of Deanne C. Siemer in Support of Motion to Dismiss................ 326

Supplemental Affidavit of David L. Sweet In Opposition to Defendants' Motion to Dismiss.. 330

Supplemental Affidavit of James P. Heffernan in Opposition to Defendants' Motion to Dismiss.. 341

Letter from Deanne C. Siemer to Judge Curtin..... 346

Interrogatory by Joseph P. D'Angelo.............. 351

Notice of meeting with court on July 17, 1975.... 352

Decision and Order of Dismissal.................. 353

Judgment On Decision By The Court................ 372

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal......................... 374

Notice of Appeal From Judgment entered November 25, 1975................................... 439

Notice from court confirming extension of time for defendant to respond to motion to vacate judgment.............................. 441

page

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.................. 442
Affidavit of Robert M. Hitchcock................. 519
Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.................................. 529
Plaintiff's Memorandum in Support of Motion to Set Aside Judgment of Dismissal (Erroneously dated January 9, 1976)...................... 552
Decision and Order, Dismissing Plaintiff's Motion to Set Aside Judgment of Dismissal... 556
Notice of Appeal from Order Denying Plaintiff's Motion to Set Aside Judgment of Dismissal... 559
Complaint.. 560
Answer of Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt................................ 571
Answer of Defendant, Joseph P. D'Angelo filed June 19, 1967................................ 588
Answer of Defendant, Joseph P. D'Angelo, to Cross-Claim of Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt filed June 19, 1967.......... 603
Notice of pretrial conference on April 2, 1971... 605
Notice To Take Deposition of Teledyne, Inc....... 607
Subpoena Duces ecum directed to Teledyne, Inc... 609
Affidavit of David L. Sweet in opposition to application of Teledyne, Inc................ 612
Proceedings wherein Defendant Himmelfarb nor his Attorneys Appeared at Offices of Heffernan, Sweet & Murphy..................... 621
Order to Show Cause to Strike Answer of Defendant, Ervin Himmelfarb.......................... 625
Decision and Order regarding taking of testimony of Henry E. Singleton......................... 638

page

Notice of pretrial conference on August 17, 1972. 644

Notice by D'Angelo to take depositions of David Sweet and Eugene Murphy.................... 646

Notice by TIC et al. to take depositions of David Sweet and Eugene Murphy............... 648

Notice of pretrial conference on December 13, 1972..................................... 560

Notice of pretrial conference on February 7, 1973..................................... 652

Notice of status report on February 7, 1974...... 653

Notice of Motion for Consolidation (Less and Raab) (Same as Raab No. 19)................. 654

Notice of Substitution of Edward D. Siemer, Esq. as counsel.................................. 663

Order of Dismissal on settlement................. 666

Stipulation of Dismissal on settlement........... 668

Docket Entries.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date: 5/10/67

Civ-1967-190

C. Form No. 106 Rev.

TITLE OF CASE

JUNIA E. RAAB

v.

TABER INSTRUMENT CORPORATION, a
York Corporation, ~~RALPH F. TABE~~
JOSEPH P. D'ANGELO, also known
FRANK WEBER, BENJAMIN MANASEN,
WARREN J. HILDEBRANDT

CINDY R. TABER and MARINE MIDLAN
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STATISTICAL RECORD	COSTS
J.S. 5 mailed	Clerk
J.S. 6 mailed	Marshal
Basis of Action:	Docket fee
ecurities and Exchange ct	Witness fees
Action arose at:	Depositions

Docket Entries.

Civ-1967-190 Junia E. Raab v. Taber Instrument Corp., et al.

DATE	PROCEEDINGS	Date Order Judgment No
1967		
May 10	Filed Complaint & Demand for Jury Trial	
10	Issued summons & 5 copies	
10	JS 5 made	
17	Filed summons-served 5/11/67 Warren J. Hildebrandt; 5/12/67 served Dr. Joseph P. D'Angelo and Benjamin M anasen and 5/16/67 served Ralph F. Taber	
June 2	" Stipulation & Order extending deft's, Joseph P. D'Angelo, time to answer to 6/20/67-Henderson, J. (notice to Mr. Sweet)	F-69
7	" Defts', Taber Inst. Corp., Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt, Answer	
19	" Deft's, Joseph P. D'Angelo, Answer	
29	" Deft's, Joseph P. D'Angelo, Consent to Change Attorneys	
Oct. 26	" Pltf's. Note of Issue-Nov. 1967 Term	
1968		
Nov. 1	" Pltf's. Note of Issue-Nov. 1968 Term	
1969		
1970		
Feb. 6	Mailed Notice of Dismissal to Messrs. Heffernan, Loss, McDonough and Phillips, Lytle, etc.	
Mar. 13	Filed Order Staying Dismissal until 6/12/70-Curtin, J. (notice & copy to Messrs. Heffernan, Loss, McDonough and Phillips, Lytle, etc.)	F-102
May 13	" Pltf's. Notice to Take Deposition	
Oct. 28	" Pltf's. Note of Issue-Nov. 1970 Term	
1971		
Mar. 2	" Affidavit & Order granting Pltf., permission to file note of issue for March 1971 term nunc pro tunc-Curtin, J (notice & copy to Messrs. McDonough & Phillips, Lytle, etc.)	F-11
3	" Pltf's. Note of Issue-March 1971 Term	✓
Apr. 2	Pretrial Conference (JTC)	
6	Filed Order re taking depositions of witnesses; directing that appearance, with answer & available papers be made by atty., Harold J. Boreanaz, immediately; setting 7/9/71 for further pretrial meeting and that pretrial statement be filed by 6/25/71; and that further adjournment of taking of depositions will not be granted without good cause-Curtin, J (notice & copy to Messrs. Heffernan, Loss, McDonough, Hitchcock & Boreanaz)	F-115
Oct. 28	" Pltf's. Note of Issue - Nov. 1971 Term	
1972		
Aug. 17	Pretrial Conference (US Magistrate)	
1973		
Mar. 16	Pretrial Conference (Curtin DJ)	✓
Aug. 27	Filed marshals ret. on notice of motion & affidavit served on Marine Midland Bk. Western & Cindy R. Taber served on 8-23-73.	
28	" Pltf. notice of motion for substituting executors etc. ret. 9-5-73	
Sept. 5	Motion by Pltf. for substitution of Atty. Motion granted Atty. to submit order.	
11	Filed order appointing Defts Cindy R Taber and Marine Midland Bank Western, as Executors of Ralph F. Taber, deceased-Curtin. DJ	F-144
1974		
Feb. 7	Attys. in Civ-1967-182 & Civ-1967-190 to meet with Judge at9:30 on 2-22-74.	✓

Docket Entries.

Civ-1967-190

Junia E. Raab v. Taber Instrument Corp., et al

D. C. 110 Rev. Civil Docket Continuation

DATE		PROCEEDINGS	Date O Judgmer
1974			
Feb.	20	Filed motion by Pltf. for an order consolidating Civ-1967-182 & Civ-1967-190 ret. 2-21-74. adj. 3-18-74	
Mar.	18	Filed Deft. Ervin Himmelfarb affidavit in opposition to the motion to consolidate with (Civ-1967-190)	
	19	" notice of change of atty. for Deft. Estate of Ralph F. Taber to Edward D. Siemer of Falk, Siemer, Glick, Tuppen & Maloney	
	18	Motion by pltfs. to consolidate with Civ-1967-182 adj. 3-25-74	
	22	Filed EBT transcript of Junia E. Raab taken 10-1-70	
	25	Motion to consolidate Civ-1967-182 & Civ=1967-190 withdrawn	
June	3	Filed letter to Miss Cindy R. Taber from Charles J. McDonough dated May 14, 1974.	
	3	Meeting with Judge. Any motions are to be made ret. on 6-24-74. Meeting adj. to 6-24-74 at 2:00pm	
	14	Filed order setting 10=15-74 as date for trial. The 6-24-74 meeting The court will determine the pretrial steps necessary so that the Oct. setting can be met-Curtin, DJ Notice & copies to Messrs. Sweet, Seimer, McDonough, Hitchcock, Fuzak, Zelman & Boreanaz	F-1
	24	Defts. given 2 wks. toreply, Pltf. one wk. to respond,argument set for 2:15PM on 7-15-74, trial set for 10-16-74.	
July	8	Return date for defts'. brief-adj. to 7/9/74	
	22	Oral argument on motions adj. to 7-24-74 at 9:00am	
	24	Filed order appointing Edward J. Carland receiver for all shares of Stock in the Taber Instrument Corp., Etc.-Curtin, DJ Notice & copies to Messrs. Sweet, Siemer, Siemer, Hitchcock, Zelman Runfola, Boreanaz, Baker & Fuzak and Carland	F-1
	24	Motion by pltf. for a separate trial of the 2nd & 3rd affirmative defenses. Decision reserved.	
1975			
Mar.	19	Pre-trial conference. Ct. is informed that more discovery is needed. Miss Siemer is given 30 days to file interrogatories.	
April	1	Filed order setting time table for discovery, defense counsel to serve interrogatories not later than 5-1-75, pltf. to respond by 6-1-75. If depositions are needed they shall be completed by 8-1-75 etc.-Curtin, DJ Notice & copies to David L. Sweet, Edward D. Siemer, Robert M. Hitchcock, Arnold Zelman, Victor Fuzak	F-1
	29	Filed defts. motion to dismiss pltfs. action.	
	29	Filed defts., Taber Instrument Corp. & Estate of Ralph Taber motion to adjourn discovery schedule.	
	29	Filed Defts. memorandum of points & authorities in support of defts. motion to dismiss	
	29	Filed defts.affidavit of service of the above 3 items.	
May	1	Filed Defts. affidavit by Deanne C. Siemer	
	1	Filed order to ensure a prompt disposition of the motion to dismiss: Pltf. will serve all affidavits & memos re. the motion by 5-12-75 & deft. will serve all further affidavits & reply memos by 5-17-75; a hearing on the motion will be on 5-19-75 etc.-Curtin, DJ Notice & copies to Messrs. Sweet, Siemer, Hitchcock, Zelman & Fuzak	F-1
	5	Filed letter to Judge Curtin from Ross Runfola dated 5-2-75 in which Deft. Benjamin J. Manasen joins in the motion to dismiss the cause of action & adj. of the discovery schedule etc.	
	6	Filed letter to Judge Curtin dated 5-5-75 from Alexander Cordes joining in the motion to dismiss for deft. Dr.Joseph P.D'Angelo	
	15	Filed Pltfs. affidavit in opposition to motion to dismiss by David L. Sweet, Atty. for Pltf.	
	15	Filed Pltfs. affidavit in opposition to motion to dismiss by James P. Heffernan, Atty. for pltf.	

Docket Entries.

DATE		PROCEEDINGS	Date Ord Judgment
1975			
May	15	Filed Pltfs. memorandum in opposition to defts. motion to dismiss.	
	19	Filed Deft. Estate of Ralph Taber reply memorandum of defts. in support of motion to dismiss.	
	19	Filed supplemental affidavit in support of motion to dismiss by defts. Taber Instrument Corp. & Estate of Ralph F. Taber	
	19	Filed defts. certificate of service .	
	19	Motion by defts. to dismiss the complaint. ✓Submitted.	
	21	Filed supplemental affidavit of David L. Sweet in opposition to defts. motion to dismiss	
	21	Filed supplemental affidavit of James P. Heffernan in opposition	
	22	Filed letter to Judge Curtin from Deanne C. Siemer dated 5-21-75	
	23	Filed Deft., Joseph P. D'Angelo interrogatory to pltf.	
July	17	Pretrial Conference (JTC) - court will set date for additional pre-trial conference	
ug.	4	Filed letter (carbon) to Deanne C. Siemer from D vid Sweet dated 7-28-75 re the course of settlement.	
	4	Filed letter to Deanne C. Siemer from David Sweet date 7-25-75 re settlement.	
	4	" letter to David Sweet from Deanne Siemer dated 7-25-75 re settlement.	
	29	Filed memo in letter form from deft., Estate of Ralph Taber atty. to Judge Curtin dated 8-25-75	
	29	" letter to Judge Curtin from David Sweet Atty. forPltf. dated 8-18-75	
v.	25	" Decision & Order granting the motion to dismiss on the ground the pltf. has failed to prosecute the case reasonably for trial. The motion is also granted because pltfs. delay has now seriously prejudiced defts'. case etc.-Curtin, DJ Notice & copies to David L. Sweet, Edward Siemer, Robert Hitchcock, Arnold Zelman, Ross L. Runfola, Victor Fuzak & Deanne Siemer	F-17
	25	JS 6 made	
	25	Filed judgment that because pltf. has failed to prosecute this case reasonably for trial the motion to dismiss is granted etc.- Clerk Notice & copies to David L. Sweet, Edward Siemer, Robert Hitchcock, Arnold Zelman, Ross L. Runfola, Victor Fuzak & Deanne Siemer	F-17
Dec.	8	Filed transcript of proceedings of 3-19-75	
	17	" Pltfs. motion for an order setting aside & vacating the judgment etc. ret. 12-29-75	
	24	" Pltf's. Notice of Appeal (copy mailed to Messrs. Siemer, Hitchcock, Zelman and Fuzak and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Sweet)	
	29	Pltfs. motion for an order setting aside & vacating the judgment. Adj. to 1-26-76 for filing of defts memo	
1976			
Jan.	26	Filed Defts'. memorandum of points & authorities in opposition to pltf's. motion to set aside judgment.	
	26	" Defts'. certificate of service.	
	26	Filing of defts. memo. No appearance for deft., No memo filed. Adj. to 1-28-76 at 9:00am for meeting.	
	26	Filed Affidavit for Deft. Joseph D'Angelo in opposition	
Feb.	5	Meeting held re pltfs. motion to reconsider judgment of dismissal. Pltf. to submit brief by 2-9-76	
	10	Filed letter to Judge Curtin dated 2-9-76 from David Sweet.	
	10	" Pltfs. supplemental affidavit.	
	10	" Pltfs. memorandum.	

CLOSED

Civ-1967-190 **Docket Entries.**

Junia E. Raab v. Taber Instrument Corp., et al.

D. C. 110 Rev. Civil Docket Continuation

DATE 1976	PROCEEDINGS	Date Order or Judgment Note
Mar. 9	Filed order dismissing pltfs. motion to vacate judgment etc. for lack of jurisdiction-Curtin, DJ Notice & copies to David Sweet, Edward Siemer, Robert Hitchcock, Arnold N. Zelman & Victor Fuzak	F-174
12	" Deposition of Junia E. Raab on 10-1-70	
12	" Deposition of Charles J. McDonough on 7-13-70	
	Following transcripts in companion case, Joseph F. Less v. Taber Instrument Corp., et al., Civ-1967-182, were filed in this case at direction of Judge Curtin:	
12	Filed Transcript of proceedings of 7-31-67 and 8-1-67 (depositions of Taber Instrument Corp. by its officers and of Defts. Ralph F. Taber, Warren J. Hildebrandt and Joseph P. D'Angelo in Civ-1967-182)	
12	" Deposition of Ralph F. Taber on 8-2-67	
12	" Depositions of Ralph F. Taber and Warren J. Hildebrandt on 8-3-67	
12	" Deposition of Benjamin Manasen on 8-4-67	
12	" Deposition of Leland E. Coulter and Warren J. Hildebrandt 10-26-67	
12	" Deposition of Joseph P. D'Angelo on 11-9-67	
12	" Deposition of Joseph P. D'Angelo and Joseph F. Less on 2-12-68	
12	" Deposition of Charles H. Till on 5-17-68	
12	" Deposition of Joseph F. Less on 7-17-69	
12	" Deposition of Joseph F. Less on 7-31-69	
12	" Deposition of Noel E. Bartlo on 9-26-69	
12	" Deposition of Noel E. Bartlo on 10-15-69	
12	" Deposition of Charles J. McDonough on 1-29-70	
12	" Deposition of Charles J. McDonough on 7-13-70	
12	" Deposition of Charles J. McDonough on 10-1-70	
12	" Depositions of Eugene J. Murphy and David L. Sweet on 10-21-72	
12	" Pltf's. Notice of Appeal (copy mailed to Messrs. Siemer, Hitchcock, Zelman and Fuzak and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Sweet)	
Apr. 7	Original papers, exhibits, docket entries and Clerk's certificate mailed to Clerk, CCA with papers and exhibits in Civ-1967-182 also	
22	Filed Transcript of proceedings on 6-3-74, 6-24-74, 7-24-74, 11-5-74, and 2-5-76 in this case and Civ-1967-182	
May 14	" Stipulation and Order that documents and exhibits set forth in Supplemental and Revised Index to Record on Appeal shall constitute the entire Record on Appeal-Curtin, DJ	F-176
	Following papers filed 5/14/76 pursuant to above order:	
14	Filed Letter dated 6/5/67 extending time of Taber Instrument Corp., et al. to answer	
14	" Notice dated 2/6/70 of possible order of dismissal under Local Rule 11	
14	" Pltf's. Subpoena duces tecum to Charles J. McDonough, Esq.	
14	" Letter dated 6/12/70 to Judge Curtin from James Heffernan, Esq.	
14	" Cy. of page from adjourned dismissal calendar for 6/12/70 showing further adjournment to 6/26/70 and removal from dismissal calendar on that date	
14	" Defts'. Notice to take deposition of pltf. on 9/11/70	
14	" Notice of pretrial conference to be held 4/2/71	
14	" Notice of pretrial conference to be held 8/17/72	
14	" Pretrial statement of Deft. Joseph P. D'Angelo	
14	" Notice of pretrial conference to be held 12/13/72	
14	" Notice of pretrial conference to be held 2/7/73	
14	" Pretrial statement of Pltfs. Junia E. Raab and Joseph F. Less (Civ-1967-182)	

Docket Entries.

Civ-1967-190

Junia E. Raab v. Taber Instrument Corp., et al.

DATE 1976	PROCEEDINGS	Date Orde Judgment
May 14	Filed Pretrial statement of Defts. Taber Instrument Corp., et al.	
14	" Notice of pretrial conference to be held 3/13/73	
14	" Notice of status report on 2/7/74	
14	" Notice of postponement of status report to 2/22/74	mic
14	" Affidavit of Charles J. McDonough, Esq., in opposition to moetion to consolidate	
14	" cy. of letter dated 3/20/74 from David Sweet, Esq., withdrawing motion for consolidation	
14	" Memorandum of points and authorities of Deft. Estate of Ralph F. Taber in opposition to motion to consolidate	
14	" Notice of meeting with Judge Curtin on 4/29/74	
14	" cy. of letter dated 5/1/74 from Clerk directing Charles J. McDonough, Esq., to secure alternate counsel and setting next pretrial meeting for 6/3/74	
14	" Letter dated 9/17/74 from Clerk setting pretrial meeting for 9/24/74	
14	" Notice of pretrial conference on 3/19/75	
14	" Letter dated 5/1/75 from Victor Fuzak, Esq., joining in motion to dismiss	
14	" Notice of meeting with court on 7/17/75	
14	" Cy. of letter from Clerk confirming extension of time for Deft. to respond to motion to vacate judgment, dated 12/24/75	
14	" Cy. of letter dated 1/27/76 from David Sweet, Esq., to Deanne C. Siemer, Esq., with cy. of a stipulation for remand	

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Docket Entries.

Jury demand date: 5/9/67

Civ-1967-182

. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
JOSEPH F. LESS v. TABER INSTRUMENT CORPORATION, a New York corporation, ~~RALPH F. TABER~~ JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, ERVIN HIMMELFARB, and WARREN J. HILDEBRANDT CINDY R. TABER and MARINE MIDLAND BANK-WESTERN, Executors of RALPH F. TABER, Deceased (amended by order dtd 9-11-73 & filed 9-11-73)	For plaintiff: James P. Heffernan Heffernan, ~~Harrison~~, Sweet & ~~Gruber~~ Murphy 1202 Marine Trust Bldg. Buffalo, New York 14203 Louis Loss Langdell Hall Cambridge, Massachusetts 02138

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Vic
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180
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STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk			5-9-67	#81440	15 00	
				MAY 10 1967			
					Treasurer of the		
J.S. 6 mailed	Marshal				U. S. c/d 55		15 00
Basis of Action:	Docket fee						
Securities Exchange Act	Witness fees						
Action arose at:	Depositions						

Docket Entries.

Civ-1967-182 Joseph F. Less v. Taber Instrument Corp., et al.

DATE	PROCEEDINGS	Date Order Judgment N
1967		
May 9	Filed Complaint & Demand for Jury Trial	
9	Issued summons & 6 copies	
9	JS 5 made	
17	Filed summons-served 5/11/67 Warren J. Hildebrandt; served 5/12/67 Dr. Joseph P. D'Angelo and Mr. Benjamin Manasen and 5/16/67 served Ralph F. Taber	
26	" Defts', Taber Instrument Corp., Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt, Answer	
June 2	" Stipulation & Order extending deft's, Joseph P. D'Angelo, time to answer to 6/20/67-Henderson, J. (notice to Mr. Heffernan)	F-69
6	Issued summons (per request of pltf's. atty.)	
8	Filed Order for Service Outside the State-Henderson, J.	F-69
8	" Motion for Service of Summs Outside State	
12	Mailed by registered mail requiring a signed receipt to deft. Ervin Himmelfarb, 64 Juarez, Mexico City, Mexico, summons & complaint with certified copy of order re service	
19	Filed Deft's, Joseph P. D'Angelo, Answer	
19	" Deft's, Joseph P. D'Angelo, Answer to Cross-Claim	
29	" Deft's, Joseph P. D'Angelo, Consent to Change of Attorneys	
July 5	" Pltf's. Notice to Take Depositions	
5	" Pltf's. Notice of Motion & Affidavit for an Order requiring deft, Joseph P. D'Angelo, to produce and permit pltf. to inspect certain documents-ret. 7/10/67	
5	" Pltf's. Notice of Motion & Affidavit for an order requiring defts, Taber Inst. Corp., Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt to produce and permit pltf. to inspect certain documents-ret. 7/10/67, 7/11/67-granted	
10	" Affidavit of Service of S&C-served 6/16/67 Ervin Himmelfarb	
20	" Order granting pltf's. motion for an order directing defts', Taber Instrument Corp., Ralph F. Taber, Benjamin Manasen & Warren J. Hildebrandt, to produce and permit pltf. to inspect and copy certain documents, etc.-Henderson, J. (notice & copy to Messrs. McDonough and Phillips, Lytle, etc.)	F-70
20	" Order granting pltf's. motion for an order directing deft, Joseph P. D'Angelo, to produce and permit pltf. to inspect and copy certain documents, etc.-Henderson, J. (notice & copy to Messrs. McDonough and Phillips, Lytle, etc.)	F-70
Oct. 2	" Pltf's. Notice to Take Deposition	
2	" Pltf's. Notice to Take Deposition	
26	" Pltf's. Note of Issue-Nov. 1967 Term	
8		
Apr. 16	" Pltf's. Notice to Take Deposition	
June 17	" Defts' Notice of Motion & Affidavit for an order compelling the pltf. to answer certain questions-ret. 6/24/68, 2/3/69-granted	
Nov. 1	" Pltf's. Note of Issue-Nov. 1968 Term	
1969 Feb. 3	" Pltf's. Affidavit	
Feb. 13	" Protective Order under Rule 37(a)-Henderson, J. (notice & copy to Mr. Heffernan)	F-89
1970 Oct. 9	Notice re dismissal mailed to Messrs. Heffernan and McDonough and to Phillips, Lytle, etc.	
28	Filed Pltf's. Note of Issue-Nov. 1970 Term	
1971		
Mar. 2	" Affidavit & Order granting Pltf., permission to file note of	

FPI—LK—8-21-64—24M—8753

Docket Entries.

Civ-1967-182 Joseph F. Less v. Taber Instrument Corp., et al.

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
1971	issue for March 1971 term nunc pro tunc-Curtin, J (notice & copy to Messrs. McDonough & Phillips, Lytle, etc.)
Mar. 3	Filed Pltf's. Note of Issue-March 1971 Term
Apr. 6	" Order re taking depositions of witnesses; directing that appearance, with answer & available papers be made by atty.,Harold J. Boreanaz, immediately; setting 7/9/71 for further pretrial meeting and that pretrial statement be filed by 6/25/71; and that further adjournment of taking of depositions will not be granted without good cause-Curtin,J (notice & copy to Messrs.Heffernan, Loss, McDonough, Hitchcock & Boreanaz)
2	Pretrial Conference (JTC)
May 7	Filed Pltf's. Notice to Take Deposition
17	" Pltf's. Notice to Take Deposition
19	" Subpoena-served Teledyne, Inc. 5/18/71
June 4	" Affidavit & Order to Show Cause why an order should not be granted quashing subpoena served on Teledyne, Inc.,etc.-Curtin, J ret.6/11/71;6/18/71 Briefs to be filed by 6/25/71
8	" Teledyne, Inc.,Affidavit of Service /Court will set adj.date for hear.of argument
17	" Pltf's.Affidavit of David L. Sweet
Oct. 12	" Order to Show Cause why an order should not be granted striking the answer of Deft.,Ervin Himmelfarb, & granting judgment by default against said deft.-Curtin, J ret.10/15/71
12	" Transcript of proceedings held at 1202 Marine Trust Bldg., Bflo.,NY on 9/9/71
12	" Decision & Order re taking deposition of Henry E. Singleton-Curtin, J (notice & copy to Messrs. Sweet & Conklin)
15	Return of Order to Show Cause-motion by Pltf.for order striking answer of Deft. Ervin Himmelfarb-submitted
28	Filed Pltf's. Note of Issue - Nov. 1971 Term
1972	
Aug. 17	Pretrial Conference (US Magistrate)
1973	
Mar. 13	Pretrial Conference (Curtin DJ)
Aug.27	Filed Marshals ret. on notice of motion & Affidavit served on Marine Midland Bk.Western & Cindy R. Taber served on 8-23-73
28	" Pltf motion for substitution of executors etc.ret. 9-5-73.
Sept. 5	Motion by Pltf. for substitution of Atty. Motion granted, Atty to submit order.
18	Filed order ~~amending~~ substituting party defendants -Curtin. DJ
1974	
Feb. 7	Attys. in Civ-1967-182 & Civ-1967-190 to meet with Judge on 2-22-74 with Judge.
20	Filed Pltfs. motion for an order that Civ-1967-182 & Civ-1967-190 be consolidated and tried as one ret. 2-21-74.
21	Filednotice of change of Atty. for Estate of Ralph F. Taber, the substituted atty. is Edward D. Siemer, of Falk, Siemer, Glick, Tuppen & Maloney with consent to change of Atty.
Mar. 4	Motion by pltf. in Civ-1967-182 & Civ-1967-190 to consolidate adj 3-1
18	Filed deft. Ervin Himmelfarb affidavit in opposition to motion to consolidate.
18	Motion by pltfs. toconsolidate with Civ-1967-190 adj. 3-25-74
22	Filed EBT transcript of Ralph F. Taber & Warren J. Hildebrandt taken on 8-3-67
22	" EBT transcript of Joseph P. D'Angelo & Joseph F. Less both taken on 2-12-68

DATE	PROCEEDINGS	Date Order or Judgment Noted
971		
	issue for March 1971 term nunc pro tunc-Curtin, J (notice & copy to Messrs. McDonough & Phillips, Lytle, etc.)	F-114
r. 3	Filed Pltf's. Note of Issue-March 1971 Term	
r. 6	" Order re taking depositions of witnesses; directing that appearance, with answer & available papers be made by atty., Harold J. Boreanaz, immediately; setting 7/9/71 for further pretrial meeting and that pretrial statement be filed by 6/25/71; and that further adjournment of taking of depositions will not be granted without good cause-Curtin, J (notice & copy to Messrs. Heffernan, Loss, McDonough, Hitchcock & Boreanaz)	F-115
2	Pretrial Conference (JTC)	
y 7	Filed Pltf's. Notice to Take Deposition	
17	" Pltf's. Notice to Take Deposition	
19	" Subpoena-served Teledyne, Inc. 5/18/71	
e 4	" Affidavit & Order to Show Cause why an order should not be granted quashing subpoena served on Teledyne, Inc., etc.-Curtin, J ret. 6/11/71; 6/18/71 Briefs to be filed by 6/25/71	F-117
8	" Teledyne, Inc., Affidavit of Service / Court will set adj. date for hear. of argument	
17	" Pltf's. Affidavit of David L. Sweet	
t. 12	" Order to Show Cause why an order should not be granted striking the answer of Deft., Ervin Himmelfarb, & granting judgment by default against said deft.-Curtin, J ret. 10/15/71	F-121
12	" Transcript of proceedings held at 1202 Marine Trust Bldg., Bflo., NY on 9/9/71	
12	" Decision & Order re taking deposition of Henry E. Singleton-Curtin, J (notice & copy to Messrs. Sweet & Conklin)	F-121
15	Return of Order to Show Cause-motion by Pltf. for order striking answer of Deft. Ervin Himmelfarb-submitted	
28	Filed Pltf's. Note of Issue - Nov. 1971 Term	
72		
g. 17	**Pretrial Conference (US Magistrate)**	
1973		
r. 13	Pretrial Conference (Curtin DJ)	
g. 27	Filed Marshals ret. on notice of motion & Affidavit served on Marine Midland Bk. Western & Cindy R. Taber served on 8-23-73	
28	" Pltf motion for substitution of executors etc. ret. 9-5-73.	
pt. 5	Motion by Pltf. for substitution of Atty. Motion granted, Atty to submit order.	
1	Filed order ~~amending~~ substituting party defendants -Curtin, DJ	F-144
1974		
b. 7	Attys. in Civ-1967-182 & Civ-1967-190 to meet with Judge on 2-22-74 with Judge.	
20	Filed Pltfs. motion for an order that Civ-1967-182 & Civ-1967-190 be consolidated and tried as one ret. 2-21-74.	
21	Filednotice of change of Atty. for Estate of Ralph F. Taber, the substituted atty. is Edward D. Siemer, of Falk, Siemer, Glick, Tuppen & Maloney with consent to change of Atty.	
ar. 4	Motion by pltf. in Civ-1967-182 & Civ-1967-190 to consolidate adj 3-18-74	
18	Filed deft. Ervin Himmelfarb affidavit in opposition to motion to consolidate.	
18	Motion by pltfs. toconsolidate with Civ-1967-190 adj. 3-25-74	
22	Filed EBT transcript of Ralph F. Taber & Warren J. Hildebrandt taken on 8-3-67	
22	" EBT transcript of Joseph P. D'Angelo & Joseph F. Less both taken on 2-12-68	

Docket Entries.

Civ-1967-182 Joseph F. Less v. Taber Instrument Corp., et al.

DATE	PROCEEDINGS	Date Orde Judgment
1974		
Mar. 22	Filed continued EBT transcript of Joseph F. Less taken 7-17-69	
25	Motion to consolidate Civ-1967-182 & Civ-1967-190. Motion withdrawn	
May 14	Filed Notice of Appearance & Retainer of Victor Fuzak for Warren Hildebrandt.	
23	Filed Notice of Retainer & Appearance of Arnold N. Zelman for deft. Benjamin Manasen	
June 3	Filed letter to Miss Cindy R. Taber from Charles J. McDonough dated May 14, 1974.	
3	Meeting with Judge. Any motions are to be made ret. on 6-24-74. Meeting adj. to 6-24-74 at 2:00pm	
14	Filed order setting 10-15-74 as date for trial. The 6-24-74 meeting the Ct. will determine the pretrial steps necessary so that the Oct. setting can be met.-Curtin, DJ Notice & copies to Messrs. Sweet, Seimer, McDonough, Hitchcock, Fuzak, Zelman & Boreanaz	F-153
25	Filed Pltfs. notice of motion for an order directing a separate, subsequent trial of the issues etc.	
24	Defts. given 2 wks to reply, Pltf. 1 wk. to respond, argument set for 2:15PM on 7-15-74, trial set for 10-16-74	
July 8	Return date for defts'. brief - adj. to 7/9/74	
22	Filed Affidavit of David L. Sweet	
22	Oral argument on motions adj. to 7-24-74 at 9:00am	
24	Filed order appointing Edward J. Carland receiver for all shares of stock in the Taber Instrument Corp., etc-Curtin, CJ Notice & copies to Messrs. Sweet, Siemer, Siemer, Hitchcock, Zelman, Runfola Boreanaz Baker, & Fuzak	F-15
24	Motion by pltf. for a separate trial of the 2nd & 3rd affirmative defenses. Decision reserved.	
Sept. 3	Filed order denying pltfs. motion for a separate trial of affirmative defenses-Curtin, DJ Notice & copies to Messrs. Heffernan, Carland, Fuzak, Zelman, Siemer and Phillips, Lytle, Hitchcock etc.	F-15
Nov. 5	Filed Mar. ret. on trial subpoenas served on Jos. P. D'Angelo, Noel Bartlo, Daycon Investors Associates, Inc., Estate of Ralph F. Taber, & McDonough, Boasberg & McDonough all served 11-1-74 and Edward J. Carland ret. as unserved	
5	Settlement placed on the record Pltf. is to receive a settlement of $560,000.00 adj. to 12-3-74 for a report as to whether settlement has been paid in full.	
Dec. 3	Filed Receivers motion for authorization for receiver to execute releases.	
3	Filed order authorizing the receiver to execute the releases-Curtin, DJ Notice & copies to James Heffernan, Edward Siemer & Ed. Carland	F-15
3	" Deft., Taber Instrument Corp. motion to dismiss the action.	
3	" order granting the motion for dismissal against all defts.- Notice & copies to David Sweet, Robert Hitchcock, Arnold Zelman Harold Boreanaz, Victor Fuzak & Ed. Siemer, Ed. Carland	F-15
3	" Deft., Taber Instrument Corp. memorandum of points & authorities in support of motion to dismiss.	
3	" stipulation of dismissal with prejudice & w/o costs.	
3	JS 6 made	
2	Status Report. No appearances. Removed from calendar.	
1976		
Feb. 11	Filed depositions of Eugene J. Murphy & David L. Sweet	
Apr. 7	Original papers, exhibits and docket entries mailed to Clerk, CCA in connection with appeal in Civ-1967-190	
22	Filed Transcript of proceedings on 6-3-74, 6-24-74, 7-24-74, 11-5-74, and 2-5-76 in this case and Civ-1967-190 (in Civ-1967-190)	

CLOSED

Docket Entries.

Civ-1967-182 Joseph F. Less v. Taber Instrument Corp., et al.

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment No
1976		
	The following papers were filed 5/14/76 pursuant to Stipulation and Order of Judge Curtin filed that date in Civ-1967-190 relative to Record on Appeal in that case:	
May 14	Filed cy. of Summons, dated 6/8/67, to Deft. Ervin Himmelfarb	
14	" Defts'. Notice to take deposition of Pltf. on 7/6/67	
14	" cy. of Answer of Deft. Himmelfarb showing service of Pltf. on 9/12/67	
14	" Pltf's. Subpoena duces tecum to Leland Koulter with Marshal's return--served 10/3/67	
14	" cy. of Pltf's. Subpoena duces tecum to Marine Midland Trust Co.	
14	" cy. of Deft. Himmelfarb's Deposition Subpoena to Pltf.	
14	" Pltf's. Notice to take deposition of Noel E. Bartlo on 8/19/69	
14	" Pltf's. Subpoena duces tecum to Noel E. Bartlo	
14	" Pltf's. Notice to take deposition of Charles J. McDonough on 12/5/69	
14	" Pltf's. Subpoena duces tecum to Charles J. McDonough	
14	" Notice of pretrial conference to be held on 4/2/71	
14	" Pltf's. memorandum in opposition to Teledyne application for protective order	
14	" Memorandum of Teledyne in support of application for protective order	
14	" Pltf's. Supplemental Memorandum dated 7/19/71	
14	" Cy. of letter dated 11/1/71 from David Sweet, Esq. to Judge Curtin	
14	" Notice of pretrial conference to be held on 8/17/72	
14	" Pretrial statement of Deft. Joseph P. D'Angelo (in Civ-1967-190)	
14	" Notice by Deft. D'Angelo to take depositions of David Sweet and Eugene Murphy on 10/14/72	
14	" Notice by Defts. Taber Instrument Corp., et al. to take depositions of David Sweet and Eugene Murphy on 10/14/72	
14	" Notice of pretrial conference to be held on 12/13/72	
14	" Notice of pretrial conference to be held on 2/7/73	
14	" Pretrial statement of Pltfs. Junia E. Raab (Civ-1967-190) and Joseph F. Less (in Civ-1967-190)	
14	" Pretrial statement of Deft. Himmelfarb	
14	" Pretrial statement of Defts. Taber Instrument Corp., et al. (in Civ-1967-190)	
14	" Notice of pretrial conference on 3/13/74 (in Civ-1967-190)	
14	" Notice of status report on 2/7/74	
14	" Notice of postponement of status report to 2/22/74	missing
14	" Affidavit of Charles J. McDonough, Esq., in opposition to motion to consolidate (in Civ-1967-190)	
14	" cy. of letter dated 3/20/74 from David Sweet, Esq., withdrawing motion for consolidation (in Civ-1967-190)	
14	" Memorandum of points and authorities of Deft. Estate of Ralph F. Taber in opposition to motion to consolidate (in Civ-1967-190)	
14	" Notice of meeting with Judge Curtin on 4/29/74 (in Civ-1967-190)	
14	" cy. of letter dated 5/1/74 from Clerk directing Charles J. McDonough, Esq., to secure alternate counsel and setting next pretrial meeting for 6/3/74 (in Civ-1967-190)	
14	" Pltf's. memorandum of law in support of motion for separate trial of certain defenses	

Docket Entries.

Civ-1967-182 Joseph F. Less v. Taber Instrument Corp., et al.

DATE 1976	PROCEEDINGS	Date Ord Judgment
May 14	Filed letter dated 6/26/74 from Robert M. Hitchcock, Esq. to Judge Curtin	
14	" cy. of letter dated 6/28/74 from David Sweet, Esq. to Judge Curtin	
14	" letter dated 6/28/74 from Deanne C. Siemer, Esq. to Judge Curtin	
14	" Defts'. memorandum in opposition to Pltf's. motion for separate trial of certain defenses, dated 7/9/74	
14	" Pltf's. Reply memorandum	
14	" letter dated 7/25/74 from Robert M. Hitchcock, Esq. to Judge Curtin	
14	" letter dated 7/26/74 from Arnold N. Zelman, Esq. to Judge Curtin	
14	" copy of letter dated 7/26/74 from David Sweet, Esq. to Judge Curtin	
14	" Letter dated 9/17/74 from Clerk setting pretrial meeting for 9/24/74 (in Civ-1967-190)	
14	" Letter dated 9/30/74 from Deanne C. Siemer, Esq. to Judge Curtin requesting postponement of trial	
14	" Letter dated 10/1/74 from Clerk postponing trial date to 11/5/74	
14	" Letter dated 10/1/74 from David Sweet, Esq. to Judge Curtin opposing trial postponement	
14	" Letter dated 10/2/74 from defendants' counsel to Judge Curtin	
14	" Notice of meeting with Judge Curtin on 10/25/74	

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN, and
WARREN J. HILDEBRANDT

Defendants

PLAINTIFF DEMANDS
TRIAL BY JURY

COMPLAINT

The plaintiff, appearing by his attorneys, HEFFERNAN, HARRISON, SWEET & GRUBER, for his complaint herein alleges:

FIRST CAUSE OF ACTION

Jurisdiction

1) This cause of action arises under §10(b), 27 and 29(b) of the Securities Exchange Act of 1934 (15 U. S. C. §78j(b), 78aa, 78cc(b)) and Rule 10b-5 (17 Code Fed. Regs. §240.10b-5), adopted by the Securities and Exchange Commission pursuant to §10(b), copies of which are annexed as Exhibit A and incorporated herein.

Parties

2) The plaintiff, Junia E. Raab, is a resident of Grand Island, Erie County, New York, in this district.

3) The defendant, Taber Instrument Corporation (hereinafter "TIC"), is a New York corporation with its principal place of business in North Tonawanda, Niagara County, New York,

in this district.

4) The defendant, Ralph F. Taber, is a resident of Amherst, Erie County, New York, in this district, and at all times herein mentioned was the President, Treasurer, a director and the largest shareholder of the defendant, TIC.

5) The defendant, Joseph P. D'Angelo, also known as Frank Weber, is a resident of Orchard Park, Erie County, New York, in this district, and at certain or all times herein mentioned acted either as an executive officer or as agent of the defendant, TIC.

6) The defendant, Benjamin Manasen, is a resident of Amherst, Erie County, New York, in this district, and at all times herein mentioned was a director of the defendant, TIC.

7) The defendant, Warren J. Hildebrandt, is a resident of North Tonawanda, Niagara County, New York, in this district, and at all times herein mentioned was the Secretary and a director of the defendant, TIC.

Underlying Facts

8) Plaintiff was employed by TIC from about February, 1954 until February, 1965, at which time he was a Vice-President and a director of TIC and owned 600 shares of its common stock. Shortly after the termination of his employment, plaintiff had a discussion concerning the possible purchase of his 600 shares with Milton Praker, Esquire, now deceased, who at that time was both a director of TIC and its attorney.

9) The defendant D'Angelo subsequently telephoned plaintiff and said that he would try to get TIC to purchase plaintiff's 600 shares at a price equal to plaintiff's cost which was about $10.00 per share.

BEST COPY AVAILABLE

10) Thereafter, in May of 1965, defendant D'Angelo made an offer to plaintiff's attorney, W. Franklin Ness, Esquire, to purchase plaintiff's 600 shares of TIC for $5.00 per share and represented that that was all that TIC would consider paying for the stock. The plaintiff rejected that offer as inadequate on the ground that the TIC balance sheet as of December 31, 1964, showed a book value of approximately $16.00 per share.

11) In June of 1965, the defendant D'Angelo repeated to Mr. Ness the offer by TIC to purchase plaintiff's 600 shares for $5.00 per share, again stating that that was the highest price TIC would pay, and Mr. Ness again rejected the offer.

12) Thereafter, in May of 1966, further negotiations took place between Charles J. McDonough, Esquire, attorney for TIC, and plaintiff's attorney, Mr. Ness, for the purchase of plaintiff's shares of TIC, resulting in an agreement whereby TIC agreed to purchase and plaintiff agreed to sell plaintiff's 600 shares at a price of $8.00 per share and the transaction was closed on June 3, 1966 by delivery of a TIC check in the amount of $4800.00.

13) None of the defendants ever disclosed, either to the plaintiff or to his attorney, certain facts material to the value of his shares, and the plaintiff did not discover those facts until some time after the closing on June 3, 1966, namely: (a) that active negotiations had taken and were taking place between representatives of TIC, including the defendants Taber and D'Angelo, and representatives of Teledyne, Inc., a Delaware corporation with its principal offices in Hawthorne, California, and its stock traded on the New York and Pacific Coast Stock Exchanges, looking to the acquisition

of TIC by Teledyne; (b) that prior to the closing on June 3, 1966, those negotiations had resulted in an agreement in principle on the acquisition of TIC's assets by Teledyne for a price greatly in excess of their book value; and (c) that the Teledyne shares received by TIC in exchange for its assets would be distributed as a liquidating dividend to TIC's stockholders.

14) If the plaintiff had known the facts alleged in paragraph 13 he would not have agreed to sell his TIC shares at the price he received.

15) On or about December 30, 1966, Teledyne did in fact acquire the assets of TIC in consideration of 45,000 shares of Teledyne stock which, pursuant to a plan of liquidation and dissolution adopted by TIC at about the same time, were to be distributed to the shareholders of TIC in proportion to their stock ownership.

16) If the plaintiff had remained a stockholder of TIC, he would have been entitled to receive on TIC's liquidation a great deal more than the $4800.00 paid for his shares by TIC.

17) The defendants TIC, Taber, and D'Angelo participated directly in the purchase of the plaintiff's stock. The defendants Manasen and Hildebrandt participated in the purchase as directors of TIC in that they authorized and approved the negotiations for the purchase. All the defendants knew of the undisclosed facts specified in paragraph 13.

18) The defendants, directly and indirectly, by use of means and instrumentalities of interstate commerce and of the mails, (1) employed a device, scheme, or artifice to defraud the plaintiff, (2) made untrue statements of material facts and

omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (3) engaged in acts, practices, and a course of business which would operate and in fact operated as a fraud or deceit upon the plaintiff, all in connection with the purchase of his TIC shares as herein alleged.

19) The contract between the plaintiff and the defendant TIC was made by TIC in violation of Rule 10b-5 and §10(b), the violation being aided and abetted by the other defendants, and that contract is void under §29(b) as regards the rights of all the defendants.

SECOND CAUSE OF ACTION

20) This cause of action is based on pendent jurisdiction.

21) Paragraphs 2-17 are incorporated by reference.

THIRD CAUSE OF ACTION

22) Paragraphs 1-18 are incorporated by reference.

23) The contract between the plaintiff and the defendant TIC was made by TIC in violation of Rule 10b-5 and §10(b), the violation beind aided and abetted by the other defendents and the plaintiff was damaged as a result.

FOURTH CAUSE OF ACTION

24) Paragraphs 2-17 and 20 are incorporated by reference.

25) The plaintiff was damaged as a result.

PRAYER

WHEREFORE the plaintiff demands against each of the defendants:

(a) Judgment that the purchase of the plaintiff's 600 shares of TIC be rescinded and that there be distributed to the plaintiff upon the liquidation of TIC that portion of the 45,000 Teledyne shares that the plaintiff's 600 shares of TIC bear to the total outstanding shares of TIC, or the monetary equivalent of that portion; and, on condition of full satisfaction of any such judgment that may be awarded, the plaintiff tenders restitution of all that he received under the purchase contract;

(b) Judgment for his damages in the amount of $60,000.00 if the rescission demanded in Clause (a) of this prayer is for any reason denied;

(c) Interest, costs, and such further relief as to the Court may seem just and proper.

HEFFERNAN, HARRISON, SWEET & GRUBER

BY

Office and Post Office Address
1202 Marine Trust Building
Buffalo, New York 14203

LOUIS LOSS

Langdell Hall
Cambridge Massachusetts 02138
Of counsel

ATTORNEYS FOR PLAINTIFF

Dated : May 8, 1967

EXHIBIT A

§ 78j(b) Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

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(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 10, 48 Stat. 891.

§ 78aa Jurisdiction of offenses and suits

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisidiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts. June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921, June 25, 1948, c. 646, § 32(b) 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§ 78cc Validity or contracts

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(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the perfromance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

§240.10b-5 Employment of manipulative and deceptive devices by any purchaser of a security. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

SUMMONS IN A CIVIL ACTION

D. C. Form No. 45a Rev. (6-49)

United States District Court

FOR THE

Western District of New York

CIVIL ACTION FILE NO. Civ-1967-190

JUNIA E. RAAB

Plaintiff

v.

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, and WARREN J. HILDEBRANDT

Defendants

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon JAMES P. HEFFERNAN

plaintiff's attorney, whose address 1202 Marine Trust Bldg., Buffalo, N.Y. 14203

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

ROLAND E. LOGEL
Clerk of Court.

Joan M. Snedden
Deputy Clerk.

Date: May 10, 1967

[Seal of Court]

Answer of Defendants Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt.

UNITED STATES DISTRICT COURT : WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

Plaintiff

CIVIL ACTION
NO. 1967-190

-vs-

TABER INSTRUMENT CORPORATION, a New York
corporation, RALPH F. TABER, JOSEPH P. D'ANGELO
also known as FRANK WEBER, BENJAMIN MANASEN and
WARREN J. HILDEBRANDT

Defendants

The defendants TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT, appearing herein by their attorneys McDONOUGH, BOASBERG, McDONOUGH & BELTZ, in answer to the plaintiff's complaint:

1. Admit the allegations contained in Paragraphs "2", "3", "4" and "15" thereof.

2. Deny having knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs "1", "8", "9", "10", "11" and "20" thereof.

3. Deny the allegations contained in Paragraphs "5", "13", "14", "16", "17", "18", "19", "23" and "25" thereof.

4. Answering Paragraph "6" thereof, the defendants admit that the defendant BENJAMIN MANASEN has been a director of the defendant TABER INSTRUMENT CORPORATION since December 8, 1965.

5. Answering Paragraph "7" thereof, admit that the defendant WARREN J. HILDEBRANDT is a resident of North Tonawanda, Niagara County, New York, and has been a director of the defendant TABER INSTRUMENT CORPORATION since 1963, and Secretary of the defendant TABER INSTRUMENT CORPORATION since December 8, 1965.

6. Admit the allegations contained in Paragraph "12" thereof, but deny that the said Paragraph "12" sets forth the entire agreement between the plaintiff and the defendant TABER INSTRUMENT CORPORATION, as hereinafter more fully set forth.

7. Deny the allegations contained in Paragraphs "21", "22" and 24" thereof, except insofar as the earlier paragraphs of said complaint, incorporated by reference therein, are earlier admitted herein.

FOR A FIRST SEPARATE AFFIRMATIVE DEFENSE, THE ANSWERING DEFENDANTS ALLEGE:

8. That the plaintiff's complaint fails to state a claim against the answering defendants upon which relief can be granted.

FOR A SEDOND SEPARATE AFFIRMATIVE DEFENSE, THE ANSWERING DEFENDANTS ALLEGE:

9. That from on or about February 1, 1954, to on or about February 19, 1965, the plaintiff was an employee of the defendant TABER INSTRUMENT CORPORATION.

10. That during his said employment, the plaintiff became the owner of 600 shares of Class A common stock of the defendant TABER INSTRUMENT CORPORATION.

11. That on or about January 25, 1962, the plaintiff was elected a director of the defendant TABER INSTRUMENT CORPORATION, and thereafter as an officer, to wit: Vice-President; and thereafter served as such director and officer until on or about February 18, 1965.

12. That by reason of the premises, and by reason of the nature of the plaintiff's employment by TABER INSTRUMENT CORPORATION, a fiduciary relationship existed between the plaintiff and the defendant TABER INSTRUMENT CORPORATION.

13. That the plaintiff JUNIA E. RAAB, as an employee of TABER INSTRUMENT CORPORATION, for some years, was a participant in a certain Profit Sharing Retirement Plan which the defendant TABER INSTRUMENT CORPORATION had established for the benefit of its employees in 1953.

14. That on or about September 2, 1965, the plaintiff JUNIA E. RAAB instituted an action in the Supreme Court of the State of New York, Erie County, demanding declaratory judgment that he was entitled to payment of a sum in excess of $22,407.88, as benefits under said TABER INSTRUMENT CORPORATION

Profit Sharing Retirement Plan.

15. That in said action brought by the plaintiff JUNIA E. RAAB as aforesaid, in addition to TABER INSTRUMENT CORPORATION, the plaintiff also named as defendants, the defendants RALPH F. TABER and WARREN J. HILDEBRANDT "as individuals as as trustees of the Board and as members of the Profit Sharing Committee of Taber Instrument Corporation Profit Sharing Retirement Plan."

16. All of the defendants in the aforesaid action appeared by McDONOUGH, BOASBERG, McDONOUGH & BELTZ, their attorneys, and interposed an answer denying the material allegations of the complaint, and set up an affirmative defense alleging, in substance, that neither the plaintiff JUNIA E. RAAB or any other employees of TABER INSTRUMENT CORPORATION had made any contribution toward the establishment, administration or financing of the Profit Sharing Retirement Plan; that it was not part of any employment contract; that the Profit Sharing Retirement Plan was established by TABER INSTRUMENT CORPORATION "for the soleepurpose of rewarding its employees for long, loyal and faithful service - - -", and that "loyal, faithful service by the participants - - -was a condition precedent, express or implied, to the defendants' obligation and agreement to make payments to participants under the terms and conditions of the said Profit Sharing Retirement Plan."

17. That the defendants' said affirmative defense further alleged:

> "That for a long time prior to February 19, 1965, the plaintiff failed to render loyal and faithful service to his employer, the defendant Taber Instrument Corporation, but on the contrary, was unfaithful and disloyal to his said employer, and to the duties and obligations imposed upon the plaintiff by his said employment." and that by reason of the breach of a

fiduciary relationship existing between the plaintiff and TABER INSTRUMENT CORPORATION, the plaintiff was not entitled to any payment or payments, as an alleged participant in the said Profit Sharing Retirement Plan.

18. A note of issue was thereafter filed in said action and the said action was placed upon the trial calendar of Supreme Court, Erie County.

19. Thereafter, the parties to said action pending in the Supreme Court, Erie County, and their attorneys, entered into negotiations for the compromise and settlement of all matters and things between all of said parties, including discontinuance of said action, which included, as an integral part thereof, negotiations for the purchase of the plaintiff JUNIA E. RAAB'S 600 shares of Class A stock by TABER INSTRUMENT CORPORATION.

20. That on or about May 25, 1966, an agreement of settlement and compromise was reached between the plaintiff JUNIA E. RAAB and the defendants TABER INSTRUMENT CORPORATION,

RALPH F. TABER and WARREN J. HILDEBRANDT, as individuals and as trustees of the Board and as members of the Profit Sharing Committee of TABER INSTRUMENT CORPORATION'S Profit Sharing Retirement Plan, wherein and whereby, as integral parts of said settlement and compromise, the defendants in said pending action agreed to pay to the plaintiff JUNIA E. RAAB the sum of $23,554.49 in settlement of his said claim for benefits under the said Profit Sharing Retirement Plan; and TABER INSTRUMENT CORPORATION also agreed to purchase the aforesaid 600 shares of TABER INSTRUMENT CORPORATION stock, at a price of $8.00 per share, or $4800.00.

21. That as a part of said agreement of settlement and compromise, and on May 31, 1966, the plaintiff JUNIA E. RAAB executed and thereafter delivered to the defendants as aforesaid, a general release of any and all liability or liabilities of all said defendants to JUNIA E. RAAB; and the defendant TABER INSTRUMENT CORPORATION duly executed and delivered to the plaintiff a general release of all liability of the plaintiff JUNIA E. RAAB to the defendants named in said pending action.

22. That thereafter and on or about June 6, 1966, as integral parts of said compromise and settlement agreement, the said defendants paid to the plaintiff JUNIA E. RAAB the sum of $23,554.49 in compromise and settlement of the plaintiff JUNIA E. RAAB'S aforesaid claim for benefits under the said Profit Sharing Retirement Plan; and the defendant TABER INSTRUMENT CORPORATION paid to the plaintiff JUNIA E. RAAB the sum of $4800.00 in payment for the aforesaid 600 shares of TABER

INSTRUMENT CORPORATION stock; and the plaintiff JUNIA E. RAAB duly endorsed and assigned the said 600 shares of Class A TABER INSTRUMENT CORPORATION stock and delivered same to TABER INSTRUMENT CORPORATION.

23. That on or about May 26, 1966, as an integral part of said compromise and settlement agreement, the parties to the said action then pending in the Supreme Court of the State of New York, Erie County, through their respective attorneys, executed and delivered a stipulation of discontinuance of said action, without costs, the same "having been fully settled and compromised"; and that the said stipulation of discontinuance was thereafter duly filed in the ErieCounty Clerk's Office.

FOR A THIRD SEPARATE AFFIRMATIVE DEFENSE, THE ANSWERING DEFENDANTS ALLEGE:

24. Repeat and reallege each and every allegation in this answer contained as though again fully set forth herein.

25. That by reason of the premises, the plaintiff JUNIA E. RAAB has accepted and retained consideration and benefits of great value, as part of said compromise and settlement agreement, and has failed to return or restore the consideration and benefits running to the plaintiff JUNIA E. RAAB, by reason of said settlement and compromise agreement.

26. That by reason of the premises, the plaintiff JUNIA E. RAAB is estopped to deny the validity of the sale of his

600 shares of stock to the defendant TABER INSTRUMENT CORPORATION, as part of said agreement of compromise and settlement; and is estopped to assert the claim or claims set forth in the plaintiff's complaint in the present action.

WHEREFORE, the answering defendants demand judgment dismissing the plaintiff's complaint with costs.

McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for the answering defendants
TABER INSTRUMENT CORPORATION
RALPH F. TABER
BENJAMIN MANASEN
WARREN J. HILDEBRANDT

by ________________________
CHARLES J. McDONOUGH
Office and P. O. Address
930 Walbridge Building
Buffalo, New York

Dated: June 7, 1967

Answer of Defendant, Joseph P. D'Angelo.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN, and
WARREN J. HILDEBRANDT,

Defendants

ANSWER

Civil Action
No. 1967-190

Defendant, Joseph P. D'Angelo, by his attorneys, Phillips, Lytle, Hitchcock, Blaine & Huber, as and for his answer to the complaint herein, alleges:

1. Denies each and every allegation contained in paragraphs 1, 20 and 25 thereof.

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 6, 7, 8, 12, 14 and 16 thereof.

3. Upon information and belief admits each and every allegation contained in paragraph numbered 4 thereof.

4. Answering paragraph numbered 5 thereof, admits that he is a resident of Orchard Park, Erie County, New York, and that at certain times mentioned in the complaint he acted either as an executive officer or an agent of TIC.

5. Denies each and every allegation contained in paragraph numbered 9 thereof and with respect thereto alleges that in April, 1965 he telephoned plaintiff who indicated that he wanted $10 per share for his stock in TIC.

6. Denies each and every allegation contained in paragraph numbered 10 thereof and in respect thereto alleges that in May, 1965 he informed Mr. Ness that Mr. Taber had authorized him to offer $5 per share and no more for plaintiff's stock in TIC.

7. Denies each and every allegation contained in paragraph numbered 11 thereof and with respect thereto alleges that in June, 1965 Mr. Ness called him and stated that plaintiff had rejected the offer of $5 per share and asked if Mr. Taber would pay more; whereupon this defendant made reply thereto and suggested that Mr. Ness talk directly with Mr. Taber.

8. Denies each and every allegation contained in paragraph numbered 13 thereof insofar as they pertain to him; and alleges that subsequent to April, 1965 he had nothing whatsoever to do with plaintiff with respect to the stock of plaintiff, and subsequent to June, 1965 he had nothing whatsoever to do with Mr. Ness or any other person with respect to the stock of plaintiff.

9. Upon information and belief admits the allegations contained in paragraph numbered 15 thereof.

10. Denies each and every allegation contained in paragraph numbered 17 thereof insofar as they pertain to him; and denies any knowledge or information sufficient to form a belief insofar as they pertain to others.

11. Denies each and every allegation contained in paragraph numbered 18 thereof insofar as they pertain to him; and denies any knowledge or information sufficient to form a belief insofar as they pertain to others.

12. Denies each and every allegation contained in paragraph numbered 19 thereof insofar as they pertain to him; and denies any knowledge or information sufficient to form a belief insofar as they pertain to others.

13. Denies each and every allegation contained in paragraph numbered 23 thereof insofar as they pertain to him; and denies any knowledge or information sufficient to form a belief insofar as they pertain to others.

AS A SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES:

14. That the complaint fails to state a claim upon which relief can be granted.

AS A SECOND, SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES:

15. Denies that the United States Court for the Western District of New York has jurisdiction over the subject matter of the action.

AS A THIRD, SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES:

16. That the United States Court for the Western District of New York has no jurisdiction over the person of this answering defendant, as plaintiff and said defendant are both citizens of the State of New York.

AS A FOURTH, SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES:

17. That the United States Court for the Western District of New York has no jurisdiction over any of the parties; as each party is a citizen of the State of New York.

AS A FIFTH, SEPARATE AND COMPLETE DEFENSE THERETO, ALLEGES UPON INFORMATION AND BELIEF:

18. That from on or about February 1, 1954, to on or about February 19, 1965, the plaintiff was an employee of the defendant Taber Instrument Corporation.

19. That during his said employment, the plaintiff became the owner of 600 shares of Class A common stock of the defendant Taber Instrument Corporation.

20. That on or about January 25, 1962, the plaintiff was elected a director of the defendant Taber Instrument Corporation, and thereafter as an officer, to wit: Vice-President; and thereafter served as such director and officer until on or about February 18, 1965.

21. That by reason of the premises, and by reason of the nature of the plaintiff's employment by Taber Instrument Corporation, a fiduciary relationship existed between the plaintiff and the defendant Taber Instrument Corporation.

22. That the plaintiff Junia E. Raab, as an employee of Taber Instrument Corporation, for some years, was a participant in a certain Profit Sharing Retirement Plan which the defendant Taber Instrument Corporation had established for the benefit of its employees in 1953.

23. That on or about September 2, 1965, the plaintiff Junia E. Raab instituted an action in the Supreme Court of the State of New York, Erie County, demanding declaratory judgment that he was entitled to payment of a sum in excess of $22,407.88, as benefits under said Taber Instrument Corporation Profit Sharing Retirement Plan.

24. That in said action brought by the plaintiff Junia E. Raab, as aforesaid, in addition to Taber Instrument Corporation, the plaintiff also named as defendants, the defendants Ralph F. Taber and Warren J. Hildebrandt "as individuals and as trustees of the Board and as members of the Profit Sharing Committee of Taber Instrument Corporation Profit Sharing Retirement Plan."

25. All of the defendants in the aforesaid action appeared by McDonough, Boasberg, McDonough & Beltz, their attorneys, and interposed an answer denying the material allegations of the complaint, and set up an affirmative defense alleging, in substance, that neither the plaintiff, Junia E. Raab, or any other employees of Taber Instrument Corporation had made any contribution toward the establishment, administration or financing of the Profit Sharing Retirement Plan; that it was not part of any employment contract; that the Profit Sharing Retirement Plan was established by Taber Instrument Corporation "for the sole purpose of rewarding its employees for long, loyal and faithful service - - -", and that "loyal, faithful service by the participants - - - was a condition precedent, express or implied, to the defendants' obligation and agreement to make payments to participants under the terms and conditions of the said Profit Sharing Retirement Plan."

26. That the defendants' said affirmative defense further alleged:

> "That for a long time prior to February 19, 1965, the plaintiff failed to render loyal and faithful service to his employer, the

> defendant Taber Instrument Corporation, but on the contrary, was unfaithful and disloyal to his said employer, and to the duties and obligations imposed upon the plaintiff by his said employment."

and that by reason of the breach of a fiduciary relationship existing between the plaintiff and Taber Instrument Corporation, the plaintiff was not entitled to any payment or payments, as an alleged participant in the said Profit Sharing Retirement Plan.

27. A note of issue was thereafter filed in said action and the said action was placed upon the trial calendar of Supreme Court, Erie County.

28. Thereafter, the parties to said action pending in the Supreme Court, Erie County, and their attorneys, entered into negotiations for the compromise and settlement of all matters and things between all of said parties, including discontinuance of said action, which included, as an integral part thereof, negotiations for the purchase of the plaintiff, Junia E. Raab's, 600 shares of Class A stock by Taber Instrument Corporation.

29. That on or about May 25, 1966, an agreement of settlement and compromise was reached between the plaintiff, Junia E. Raab and the defendants, Taber Instrument Corporation, Ralph F. Taber and Warren J. Hildebrandt, as individuals and as trustees of the Board and as members of the Profit Sharing Committee of Taber Instrument Corporation's Profit Sharing Retirement Plan, wherein and whereby, as integral parts of said settlement and compromise, the defendants in said pending action agreed to pay to the plaintiff, Junia E. Raab, the sum of

$23,554.49 in settlement of his said claim for benefits under the said Profit Sharing Retirement Plan; and Taber Instrument Corporation also agreed to purchase the aforesaid 600 shares of Taber Instrument Corporation stock, at a price of $8.00 per share, or $4,800.00.

30. That as a part of said agreement of settlement and compromise, and on May 31, 1966, the plaintiff, Junia E. Raab, executed and thereafter delivered to the defendants as aforesaid, a general release of any and all liability or liabilities of all said defendants to Junia E. Raab; and the defendant, Taber Instrument Corporation, duly executed and delivered to the plaintiff a general release of all liability of the plaintiff, Junia E. Raab, to the defendants named in said pending action.

31. That thereafter and on or about June 6, 1966, as integral parts of said compromise and settlement agreement, the said defendants paid to the plaintiff, Junia E. Raab, the sum of $23,554.49 in compromise and settlement of the plaintiff, Junia E. Raab's, aforesaid claim for benefits under the said Profit Sharing Retirement Plan; and the defendant, Taber Instrument Corporation, paid to the plaintiff, Junia E. Raab, the sum of $4,800.00 in payment for the aforesaid 600 shares of Taber Instrument Corporation stock; and the plaintiff, Junia E. Raab, duly endorsed and assigned the said 600 shares of Class A Taber Instrument Corporation stock and delivered same to Taber Instrument Corporation.

32. That on or about May 26, 1966, as an integral part of said compromise and settlement agreement, the parties to

the said action then pending in the Supreme Court of the State of New York, Erie County, through their respective attorneys, executed and delivered a stipulation of discontinuance of said action, without costs, the same "having been fully settled and compromised"; and that the said stipulation of discontinuance was thereafter duly filed in the Erie County Clerk's Office.

AS A SIXTH, SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES UPON
INFORMATION AND BELIEF:

33. Repeats and reiterates each and every allegation of this answer numbered 18 through 32 with the same force and effect as if the same were fully set forth at this place.

34. That by reason of the premises, the plaintiff, Junia E. Raab, has accepted and retained consideration and benefits of great value, as part of said compromise and settlement agreement, and has failed to return or restore the consideration and benefits running to the plaintiff, Junia E. Raab, by reason of said settlement and compromise agreement.

35. That by reason of the premises, the plaintiff, Junia E. Raab, is estopped to deny the validity of the sale of his 600 shares of stock to the defendant, Taber Instrument Corporation, as part of said agreement of compromise and settlement; and is estopped to assert the claim or claims set forth in the plaintiff's complaint in the present action.

WHEREFORE, defendant, Joseph P. D'Angelo, demands judgment dismissing the complaint together with the costs and disbursements of this action.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER

By ROBERT M. HITCHCOCK
Member of the Firm

Attorneys for Defendant,
Joseph P. D'Angelo
Office and Post Office Address
1330 Marine Trust Building
239 Main Street
Buffalo, New York, 14203

Note of Issue.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN, and
WARREN J. HILDEBRANDT,

Defendants

NOTE OF ISSUE

CIVIL ACTION NO.

1967-190

HEFFERNAN, HARRISON, SWEET & GRUBER, 1202 Marine Trust Building, Buffalo, New York, and LOUIS LOSS, Langdell Hall, Cambridge, Massachusetts, Attorneys for Plaintiff.

McDONOUGH, BOASBERG, McDONOUGH & BELTZ, Attorneys for Defendants, Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt, 930 Walbridge Building, Buffalo, New York,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, Attorneys for Defendant, Joseph P. D'Angelo, 1330 Marine Trust Building, Buffalo, New York.

The last pleading was served in this case on June 15th, 1967.

Action triable by Jury.

Trial desired at Term of Court commencing November 14th, 1967.

Note of Issue.

The specific nature and object of this action is rescission, under Sections 10 (b), 27 and 29 (b), Securities Exchange Act of 1934 and Rule 10 b-5 of the Securities and Exchange Commission.

The Clerk of the United States District Court will please file this Note of Issue for the Trial Term of this Court to be held November 14th, 1967 at Buffalo, New York.

Dated : October 25th, 1967

HEFFERNAN, HARRISON, SWEET & GRUBER
1202 Marine Trust Building
Buffalo, New York 14203

and

LOUIS LOSS
Langdell Hall,
Cambridge, Massachusetts

ATTORNEYS FOR PLAINTIFF

Note of Issue.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN, and
WARREN J. HILDEBRANDT,

Defendants

NOTE OF ISSUE

Civil Action No.
1967-190

HEFFERNAN, SWEET & MURPHY (formerly HEFFERNAN, HARRISON, SWEET & GRUBER) 1202 Marine Trust Building, Buffalo, New York, and LOUIS LOSS, Lnagdell Hall, Cambridge, Massachusetts, Attorneys for Plaintiff.

McDONOUGH, BOASBERG, McDONOUGH & BELTZ, Attorneys for Defendants, Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt, 930 Walbridge Building, Buffalo, New York,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, Attorneys for Defendant, Joseph P. D'Angelo, 1330 Marine Trust Building, Buffalo, New York.

The last pleading was served in this case on June 15th, 1967.

Trial desired at Term of Court commencing November 12th, 1968.

Note of Issue.

The specific nature and object of this action is rescission, under Sections 10 (b), 27 and 29 (b), Securities Exchange Act of 1934 and Rule 10 b-5 of the Securities and Exchange Commission.

The Clerk of the United States District Court will please file this Note of Issue for the Trial Term of this Court to be held November 12th, 1968 at Buffalo, New York.

Dated: October 31st, 1968

HEFFERNAN, SWEET & MURPHY
1202 Marine Trust Building
Buffalo, New York 14203

and

LOUIS LOSS
Langdell Hall,
Cambridge, Massachusetts

ATTORNEYS FOR PLAINTIFF

Notice of possible order of dismissal under Local Rule 11.

ROLAND E. LOGEL, CLERK

MOTION DAYS —
MONDAYS AT BUFFALO
SECOND AND FOURTH
MONDAYS AT ROCHESTER

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NIAGARA SQUARE
BUFFALO, N. Y. 14202

TIMES AND PLACES OF HOLDING COURT

At Buffalo—Second Tuesdays in March and November. February for Admiralty.
At Rochester—Second Tuesdays in May and October.
At Jamestown—Second Tuesday in July.
At Elmira—Second Tuesday in September.

February 6, 1970

James P. Heffernan
Louis Loss
Charles J. McDonough
Phillips, Lytle, Hitchcock, Blaine & Huber

Re: Junia E. Raub v. Taber Instrument Corp., et al. - Civ-1967-190

TO ATTORNEYS OF RECORD HEREIN:

Pursuant to General Rule Eleven of the Court, notice is hereby given that an ORDER OF DISMISSAL without prejudice will be entered by the Clerk as of course in the above entitled cause in which no action has been taken for at least one year, unless cause in opposition to such disposition be shown at the call of the dismissal calendar which will be held in the U.S. Courthouse at Buffalo, New York, on March 13, 1970 at 10:00 a.m.

Very truly yours,

ROLAND E. LOGEL, Clerk

Order (Staying dismissal until June 12, 1970 and ordering status report at that time).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

v.

TABER INSTRUMENT CORPORATION, ET AL. Civ-**1967-190**

SIR Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the **13th** day of **March 1970**, and entered in the office of the Clerk of the United States District Court, Western District of New York, on the **1[illegible]th** day of **March 1970**.

Dated: Buffalo, New York

March 13, 1970

ROLAND E. LOGEL, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

To **James P. Heffernan**
Louis Loss
Attorney for Plaintiff

To **Charles J. McDonough**
Phillips, Lytle, Hitchcock, Blaine & Huber
Attorney for Defendant

FEDERAL RULES OF CIVIL PROCEDURE 77(d)

Order (Staying dismissal until June 12, 1970 and ordering status report at that time).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JULIA B. RAAB

v. Civ-1967-120

TABER INSTRUMENT CORPORATION, ET AL.

The above matter was on the dismissal calendar and called for dismissal on Friday, March 13, 1970.

ORDERED that dismissal of this action is stayed until Friday, June 12, 1970, at 9:30 a.m. At that time there shall be a status report in Part II, United States District Court, United States Courthouse, Buffalo, New York. Unless good cause is shown in writing, said action shall be dismissed.

John T. Curtin

JOHN T. CURTIN
United States District Judge

BEST COPY AVAILABLE

Plaintiff's subpoena deposition to McDonough.

CIVIL SUBPOENA PRODUCE DOCUMENT OR OBJECT — C. Form No. 48 (Rev. 2-57)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB, Plaintiff *vs.* TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, and WARREN J. HILDEBRANDT, Defendants	CIVIL ACTION FILE NO. No. 1967-190

TO : CHARLES J. McDONOUGH, ESQ.
930 Walbridge Building
Buffalo, New York 14202

YOU ARE HEREBY COMMANDED to appear at the offices of PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER at 1330 Marine Trust Bldg. in the city of Buffalo on the 29th day of May 1970 at 2:00 o'clock P. M. to testify on behalf of JUNIA E. RAAB, plaintiff in the above entitled action and bring with you all of the documents and things set forth in the attached Schedule marked Exhibit "A" and appended hereto.

April 27th, 1970

HEFFERNAN, SWEET & MURPHY
Attorney for
1202 Marine Trust Building
Address
Buffalo, New York 14203

________________________, *Clerk.*

By________________________, *Deputy Clerk.*

RETURN ON SERVICE

Received this subpoena at ______ on ______ and on ______ at ______ served it on the within named ______ by delivering a copy to h ______ and tendering to h ______ the fee for one day's attendance and the mileage allowed by law.[1]

Dated:

________________, 19____

________________________,

By________________________.

Service Fees
Travel ____________$
Services ____________
Total ____________$

Subscribed and sworn to before me, a ______ this ______ day of ______, 19 ______.

Plaintiff's subpoena deposition to McDonough.

EXHIBIT "A"

Letters, reports, notes, memoranda, agreements, drafts of agreements or other documents or papers relating to the following :

1) The acquisition by Teledyne Inc. of the capital stock, business or assets of Taber Instrument Corporation, including all negotiations with respect thereto.

2) The acquisition of the stock of Taber Instrument Corporation owned by Junia E. Raab, the plaintiff herein, including all negotiations with respect thereto.

3) The settlement and discontinuance of the law suit instituted in Supreme Court, Erie County New York referred to in Paragraph 14 of the answer interposed in this action by the defendants Taber Instrument Corporation, et al.

4) The activities or conduct of Junia E. Raab alleged in the "Affirmative Defenses" of the answer interposed in this action by Taber Instrument Corporation, et al.

5) A certain lawsuit pending in the State of California in February 1966 between Teledyne Inc. and Taber Instrument Corporation.

6) The borrowing by Taber Instrument Corporation from Erwin Himmelfarb of about $100,000.00 and about $45,000.00 from Benjamin Manasen on or about June 3rd, 1966, and the repayment of said loans.

7) Litigation between Daycon Investors Associates, Inc. and/or Joseph D'Angelo and Taber Instrument Corporation.

10) The liquidation of Taber Instrument Corporation, including the distribution of shares of Teledyne Inc.

Plaintiff's Notice to Take Deposition of Charles J. McDonough.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

Plaintiff

vs.

TABER INDSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, and WARREN J. HILDEBRANDT

Defendants

NOTICE TO TAKE DEPOSITION
CIVIL ACTION NO. 1967-190

PLEASE TAKE NOTICE that at 2:00 P.M. on May 29th, 1970, at the offices of PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, 1330 Marine Trust Building, Buffalo, New York, the plaintiff in the above entitled action will take the deposition of CHARLES J. McDONOUGH. The deposition will be taken upon oral questions, pursuant to the Federal Rules of Civil Procedure before a Notary Public, or any other officer authorized by law to administer oaths.

Dated : April 27th, 1970

HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff
Office & Post Office Address
1202 Marine Trust Building
Buffalo, New York 14203

TO McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for Defendants,
TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN, and WARREN J. HILDEBRANDT
Office & Post Office Address
930 Walbridge Building
Buffalo, New York 14202

Plaintiff's Notice to Take Deposition of Charles J. McDonough.

TO: PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for the Defendant, JOSEPH P. D'ANGELO
Office and Post Office Address
1330 Marine Trust Building
Buffalo, New York 14203

Letter to court from James Heffernan.

June 12th, 1970

Hon. John T. Curtin
United States District Court
U.S. Court House
Buffalo, New York

Re: RAAB vs. TABER INSTRUMENT CORP., et al
Civil No. 1967-190

Dear Judge Curtin :

This case appeared on the dismissal calendar call on March 13th, 1970. We reported to you briefly on the status of the case and you instructed us to file a written report of progress in the case on June 12th, 1970.

RAAB vs. TABER INSTRUMENT CORP. is a companion case to LESS vs. TABER INSTRUMENT CORP. Both plaintiffs sue for rescission of the sale of their stock in Taber Instrument Corporation, claiming violations of S.E.C. Rule 10b-5 by reason of failure of the defendants to disclose pending negotiations for the acquisition of Taber Instrument Corporation by Teledyne Corp. at a much higher price than they were paid for their stock.

With respect to the evidence common to the claims of both the plaintiffs, i.e., the circumstances surrounding the negotiations for the acquisition of Taber Instrument Corporation by Teledyne, we have taken extensive discovery by way of examination before trial of Taber Instrument Corporation and its officers and directors pursuant to notices which we issued in the LESS action.

With respect to the negotiations for the purchase of the stock of the plaintiff RAAB, and the affirmative defenses interposed as to his claim, we served a notice to

Letter to court from James Heffernan.

Hon. John T. Curtin Page Two

take the examination before trial of Mr. Charles McDonough who, we are informed, conducted said negotiations on behalf of the defendants, and subpoenaed Mr. McDonough to attend. This examination was scheduled for May 29th,1970, which was the adjourned date for the completion of his examination before trial in the _Less_ case, which had been adjourned from time to time because of Mr. McDonough's engagement in other matters. Shorly before May 29th, 1970, these examinations were postponed at Mr. McDonough's request because of his engagement in a trial in Supreme Court, Erie County. They were rescheduled for Monday, July 13th,1970, which Mr. McDonough informed us was the earliest that his other commitments would permit.

The _Raab_ suit is being actively and diligently prosecuted, and we will have both it and the _Less_ suit brought on for trial at the earliest possible date.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By :

JPH:ld

Order (Case removed from dismissal calendar).

ADJOURNED DISMISSAL CALENDAR - JUNE 12, 1970

CIVIL

11,792 George P. Shultz v. Limco Importers, Inc. & 1
John A. Hughes

Adj to July 1, 1970 -
Counsel attempting sign consent decree

1966-35 Elizabeth J. Taylor, et al. v. USA
Kevin P. Maloney H. Kenneth Schroeder, Jr.

Dis

1967-66 Sam Jones, Jr. v. New York Central Railroad Co.
Charles J. McDonough Ogden R. Brown

Adj. 2 weeks

1967-1[illegible]0 Junia E. Raab v. Taber Instrument Corp., et al.
James P. Heffernan Charles J. McDonough
Louis Loss Phillips, Lytle, Hitchcock, Blaine & Huber

Adj 2 weeks

1968-309 Albert Melon v. New York State Workmen's Corp., et al.
Robert Epstein

Melon's lawyer to file
Motion to Amend Complaint
By today, June 12, 1970

1968-419 Leonard Sargent v. Erie Lackawanna Railroad Company
Jan M. Schlesinger Pierre W. Evans
Eugene J. Murphy

1968-422 USA v. Howard D. Major & 1
H. Kenneth Schroeder, Jr.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

- -

JUNIA E. RAAB,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York Corporation; RALPH F.
TABER: JOSEPH P. D'ANGELO, also
known as FRANK WEBER: BENJAMIN MANASEN,
and WARREN J. HILDEBRANDT,
Defendants.

- -

Examination before trial of CHARLES J. McDONOUGH, held before James E. Crosby, Notary Public, at 1330 Marine Trust Building, Buffalo, New York, on Monday, July 13, 1970, pursuant to notice.

APPEARANCES: HEFFERNAN, SWEET & MURPHY,
BY: DAVID L. SWEET, ESQ.,
Attorneys for Plaintiff.

McDONOUGH, BOASBERG, McDONOUGH & BELTZ,
BY: CHARLES J. McDONOUGH, ESQ.,
Attorneys for Defendants, Taber Instrument Corporation, Ralph F. Taber, Warren J. Hildebrandt and Benjamin Manasen.

PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER,
BY: ROBERT M. HITCHCOCK, ESQ.,
Attorneys for Defendant D'Angelo.

EXHIBITS

Plaintiff's No.	Nature	For Identification
1.	Document	9 1106
2.	Yellow sheet containing hand-written notes by Mr. McDonough	16 1113
3.	Letter from Taber Instrument Company to Mr. McDonough	18 1115
4.	Stock Record Book, Class "A" stock, of Taper Instrument Corporation	21 1118
5.	Duplicate-original of Release by Mr. Raab to Taber Instrument Corporation	24 1121
6.	Letter from Mr. McDonough to Mr. Kaufman, dated 6-20-66, which is also Exhibit 107 in the Less action	24 1121
7.	Stipulation of Discontinuance, dated 5-26-66	27 1124

MR. SWEET: Stipulated by and between the attorneys for the respective parties that the oath of the Referee is waived; that signing, filing and certification of depositions are waived; that all objections, except as to the form of the questions, are reserved until the time of trial, and that the same may be read at the trial within the limits prescribed by the CPLR.

MR. HITCHCOCK: So stipulated.

CHARLES J. McDONOUGH, having first been duly sworn, was examined and testified as follows:

EXAMINATION BY MR. SWEET:

Q. Now, Mr. McDonough, you were engaged by Taber Instrument Corporation with respect to some matters involving a Junia E. Raab, the Plaintiff in this action?

A. Yes.

Q. And would you tell us, please, when that was that you were so engaged?

A. Well, I would have to look at my file. My present recollection was that it was sometime in the late Summer or early Fall or late Summer of 1965.

Q. And was Mr. Raab still employed by Taber Instrument Corporation at that time, or not?

A. I don't recall.

Q. Did you represent Taber Instrument Corporation with respect to a claim for Unemployment Benefits brought by Mr. Raab in 1965, April or May of 1965?

A. You mean Employees Retirement System?

A. No, this was Unemployment, New York State Unemployment?

A. I don't think so.

Q. What did the matter consist of that you were engaged in by Taber Instrument?

A. Off the record.

(DISCUSSION OFF THE RECORD.)

THE WITNESS: As I recall, it was with respect

to his claim for benefits under the
Taber Instrument Corporation
Profit Sharing Retirement Plan
and his lawsuit in Supreme Court,
Erie County, with respect thereto.

BY MR. SWEET:

Q. Well, there was an action commenced on behalf of Mr. Raab against Taber Instrument Corporation and others in September of 1965; is that correct, Mr. McDonough?

A. That is right.

Q. And Mr. Raab was represented by W. Franklin Ness in that action?

A. Yes.

Q. And you appeared and defended that action on behalf of all of the defendants named in that action; is that right? That is, Taber Instrument Corporation and Ralph F. Taber and Warren J. Hildebrandt and individuals and Trustees of the Board and members of the Profit Sharing Committee of Taber Instrument Corporation?

A. Yes.

Q. And on behalf of those defendants, you inter-

1102

posed an answer?

A. Yes.

Q. In which you asserted affirmative defenses, including the defense that Mr. Raab was not entitled to any Profit Sharing monies because of -- because he had failed to render loyal and faithful service to Taber Instrument Corporation. That was one of the defenses that you asserted; is that right?

A. Yes.

Q. And the action brought by Mr. Raab, was -- well, strike that out. At or about the same time the action we just referred to was brought by Mr. Raab, there were actions brought by Joseph Less, Donald Less and Stanley Less, separate actions, against the same defendants for Profit Sharing Benefits under the same Plan; is that right?

A. I am not sure what the sequence was. I know that Taber Instrument Corporation action against Viatran and the Less' and Joslin Manasen was brought about that time. I believe that was the first action started and then came the action in which Raab was plaintiff, and the Less' were plaintiffs.

Q. Well, there came a time, didn't there, when all four of those actions for Profit Sharing monies against Taber Instrument Corporation and those defendants that we have just mentioned, all four of them, that is the suit by Mr. Raab, the suit by Joseph Less, Donald Less and Stanley Less, respectively, were all pending at the same time in Supreme Court, Erie County?

A. That is true.

Q. There came a time when the -- well, you made a motion in Supreme Court, Erie County, that all four of those actions be -- that all four of those actions and another action, which was captioned as "Taber Instrument Corporation, as plaintiff, against Viatran Corporation, Eugene Murphy, doing business under the name of Viatran, Joseph F. Less, Donald J. Less and Donald E. Joslyn, as defendants, and that all five of those actions be consolidated or tried jointly; is that right?

A. I believe that is true.

Q. And that motion was still pending and had not yet been determined at the time that the action is -- well, at the time that Joseph Less's stock was purchased and the four actions involving the Less parties, the four actions, were discontinued?

A. The motion had been argued, I believe, before Justice Kelly, but he had not yet decided it when the over-all settlement between the Less' and Taber Instrument Corporation and the over-all settlement between the plaintiffs, Junia Raab and Taber Instrument Corporation was settled.

Q. Well now, let me just -- well, all right. So the motion was never decided by Judge Kelly; is that right?

A. That is right.

Q. Well, during the pendency of the Raab versus -- well, the action in which Raab was Plaintiff, did you have any discussions, let's put it this way, prior to the settlement of the Less case and the cases that were settled at the same time Less' -- prior to that time had you ever had any negotiations or discussions with Mr. Raab or Mr. Ness with respect to the purchase by

8
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Taber Instrument Corporation or any of its principals, of the stock of Taber Instrument Corporation?

A. I never recall ever meeting Mr. Raab or discussing it with him. I did have a discussion or discussions with Mr. Frank Ness, his attorney, but as to the sequence of my discussions with Mr. Ness with relation to the date of settlement of the Less case, as I mentioned --

Q. Well, have you got any documents with you, Mr. McDonough, pertaining to the acquisition of the Raab stock, or the negotiations for it?

A. I do.

Q. May we see them, please?

A. You may not see one document I have, because it is -- it contains part -- contains notations which in part are privileged as being confidential communications between myself and my client, and it also contains notes with respect to my conversations with Mr. Ness which I will be happy to read into the record, under the same stipulation that we made in the Joseph Less case.

Q. All right. Would you proceed to read them in? The stipulation that you are referring to that we will not demand that you submit to us the document that you are referring to?

A. That is right.

Q. And at least, not solely on the grounds that you have used it to refresh your recollection. We are not conceding at this point that the matters that you claim are privileged are in fact privileged.

A. Yes, I suppose.

MR. SWEET: Would you mark that, please.

(Whereupon, the above mentioned document was marked Plaintiff's Exhibit No. 1 for Identification.)

THE WITNESS: What was the question?

(Whereupon, the pending question was read back by the reporter.

THE WITNESS: No.

A

MR. HITCHCOCK: You said you would read in the parts you do not claim are privileged.

THE WITNESS: Yes. I will start with a part that is not privileged.

"5-24-66, I made above offer to F. Ness, attorney. He will let me know in a few days."

"5-26-66, Ness = Raab will take $8.00 per share and Retirement Benefits. Okay. C. J. McD."

"6-1-66, Ness ready to close deal; wants release from Taber Company."

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BY MR. SWEET:

Q. And it says, "above" -- what was the first reference there, Mr. McDonough?

A. It says, "I made above offer".

Q. "Above offer" -- well, can you paraphrase or tell us what "above offer" refers to?

A. Yes, I can tell you what my offer was to Mr. Ness. It was $8.00 per share for his stock, and also paying his Retirement Fund Benefits and discontinuance of the pending action.

Q. Now, have you got anything else on that subject?

A. I have a number of other documents which I produced subject to your subpoena.

Q. I believe you just testified or recited from your notes, a reference to a discussion you had with Mr. Ness on May 24, 1966?

A. Correct.

Q. Now, this action in which Mr. Raab was the plaintiff, where his Profit Sharing money had been under way since September of 1965, had there been any previous discussion at all between you and Mr. Ness over the possibility of Taber Instrument Corporation purchasing Mr. Raab's stock?

A. I don't recall, Mr. Sweet, whether there were or not. You mean before May 24th?

Q. Before May 24th of 1966?

A. I don't remember. I have no memorandum of such --

Q. You have nothing in your records that would bear upon that? You have given us everything you have pertaining to the only discussions that you know of with Mr. --

A. I have read into the record the only notes or memoranda of my own that I have with reference to any discussion of the Raab matters with Mr. Ness.

Q. And you have no previous correspondence --

A. Pardon me -- except for the yellow sheets included in the papers which I gave to you, which I believe recite the -- what happened on the date of the consummation of the settlement.

Q. All right. And there is no previous correspondence either,then, between you and Mr. Ness with regard to the possibility of the purchase of his client's stock?

A. There was no previous correspondence on that, I am sure. There may have been earlier talks but I don't recall.

Q. There may have been earlier talks concerning this subject of the purchase of his stock between --

A. It is possible.

Q. -- between yourself and Mr. Ness?

A. Yes, it is possible.

Q. All right. Now, do you recall whether this -- in what manner this conversation of May 24, 1965 was carried on; was that in person or by telephone, or what?

A. I frankly do not remember. Of the three conversations I have noted, I believe at least one of them took place in either the Erie County Hall or the Buffalo Athletic Club, but I am not sure which one. One or two of them, I believe, were on the telephone.

Q. I see. Now, by May 24, 1966, you had already been in touch with the attorneys for Teledyne; you were in possession by that time, were you not, of the first draft of the proposed agreement for the acquisition by Teledyne of Taber Instrument Corporation?

A. No. I am sure I wasn't. I testified in the other case that I received that in either the third or fourth week of May, 1966.

Q. I know. We are talking about the third week of May, the 24th?

A. Yes.

Q. Well, let's get back to that. Mr. McDonough, could we refer, please, Exhibit No. 95 in the action of Less against Taber Instrument Corporation, et al, pending in District Court?

A. I have read it.

Q. Now, would you kindly refer to your testimony of January 29, 1970 in that case, the line beginning at Line 4 --

A. What page, please?

Q. Page 7 -- excuse me.

A. Yes. Yes, I read that.

Q. Well now, your testimony there is to the effect that -- well, let's go back here, Plaintiff's Exhibit No. 95 is a letter to you from Irell & Manella, dated May 24, 1966?

A. That is right.

Q. Concerning some missing pages to the proposed plan of reorganization and agreement between Taber Instrument Corporation and Teledyne, Inc.?

A. Right.

Q. And you testified on January 29, 1970, that your recollection was that you had had a telephone conversation with Mr. Kaufman of Irell & Manella, about the day previous to the date of Exhibit No. 95, which was dated May 24, 1966 and therefore your recollection was that you had talked with Mr. Kaufman on May 23, 1966?

A. That is right.

Q. Is that correct?

A. That is correct.

Q. Is that still your testimony, Mr. McDonough?

A. Oh, yes.

Q. Well then, on May 24, 1966, the date of your conversation with Mr. Ness concerning the purchase by Taber of the stock of his client, Mr. Raab, you were aware that negotiations were pending, or were in progress, for the acquisition of Taber Instrument Corporation by Teledyne?

A. I must have been. My conversation with Mr. Kaufman, the day before.

Q. Right. Now --

A. Or approximately that time.

Q. Did the fact that these negotiations with Teledyne were in progress come up in the course of your discussions with Mr. Ness about the purchase of Mr. Raab's stock?

A. No, they did not.

Q. No mention was made of it?

A. Not that I recall.

Q. Now, was the transaction as you have described it from your notes, actually consummated, and was the stock of Mr. Raab purchased?

A. Yes, it was.

Q. Now, as part of the settlement agreement which I described -- well. would you mark that, please --

(Whereupon, the above mentioned document was marked Plaintiff's Exhibit No. 2 for Identification.)

BY MR. SWEET:

Q. Now, this is Plaintiff's Exhibit No. 2 for Identification, a yellow sheet with some handwritten notes in your handwriting, Mr. McDonough?

A. That is right.

Q. What do these notes indicate?

A. Well, it gives the details of the consummation of the settlement for Mr. Raab with Mr. Ness as Mr. Raab's attorney.

Q. And what does it say; what are those --

A. Do you want me to read it? It reads, in its entirety, "6-6-66 McD. gave W.Ness two checks payable to Junia E. Raab, M&T Trust Company, present retirement, $23,554.49. Taber Instrument Company (stock) $4,800.00 plus release and duplicates, T.I.C. that is Taber Instrument Corporation, Junia E. Raab, McD. received from

W. Ness, three certificates of Taber Instrument Corporation, Class "A" and 600 shares, Series numbered 1008, 1017 and 1020, for 200 shares each (200 each) and all endorsed in blank by J.E.Raab, plus three copies, General Release, J.E.R. (and that is Junia E. Raab), Taber Instrument Company, and three stips of discontinuance."

13

Q. Now, the Stipulations of Discontinuance in that action, were they filed by you, Mr. McDonough?

A. You mean in the Erie County Clerk's Office?

Q. Yes.

A. I believe so, or I believe they were filed by someone in my office.

Q. Now, did you forward to Taber Instrument Corporation a copy of those?

A. (No response.)

Q. What did you do with the stock certificates then, with the Assignment? There is nothing in what you gave us.

A. I turned them over to the Corporatic

Q. How did you transmit them to the Corporation?

A. I don't recall whether I handed them to Mr.

Hildebrandt, or not.

Q. I see. Now, if you sent them by letter, did you enclose a letter with them?

A. I don't recall.

Q. Well, do you have all the documents with you?

A. I have the stock book.

Q. Well, I wonder if you have with you --

A. The cancelled certificates are already in.

Q. I don't mean that. I mean, have you your entire file with you with respect to Raab?

A. With this Raab case, yes. I would presume, with the lack of any covering letter, that I personally gave them to Mr. Hildebrandt's secretary.

MR. SWEET: Would you mark this, please?

(Whereupon, the above mentioned document was marked Plaintiff's Exhibit No. 3 for Identification.)

BY MR. SWEET:

Q. Mr. McDonough, referring now to Plaintiff's Exhibit No. 3, is that a letter to you, dated June 3, 1966 from Taber Instrument Corporation?

A. Yes, it is.

Q. And this letter states that it encloses a check of Taber Instrument Corporation for $4,800.00 covering the purchase of 800 shares of Class "A" stock at $8.00 per share and a check of the Manufacturers & Traders Trust Company in the amount of $22,554.49, the payment of Benefits in the Taber Instrument Corporation Profit Sharing Retirement Plan and a General Release from Taber Instrument Corporation and Mr. R. F. Taber, to Junia E. Raab; is that right?

A. That is right.

Q. Do you recall how you received that letter, Mr. McDonough? Is there anything to indicate whether you got this otherwise than through the mail?

A. Nothing to indicate how I received that, whether it was hand-delivered or through the mail, don't recall.

Q. All right. Now, you closed this transaction with the purchase of Mr. Raab's stock, with Mr. Ness on June 6th., is that correct?

A. That is right.

Q. And that is the same day, is it, that you had the meeting in your office with the representatives of Doctor Singleton and Mr. Kaufman and various people?

A. I believe it was.

Q. Did the subject of purchase of Mr. Raab's stock come up in the course of that meeting; do you know?

A. It may have. I don't recall.

Q. Well, when the matter of the purchase of Mr. Less's stock was mentioned at that meeting, it was a casual discussion about it, there was talk that Teledyne would want some change in the terms of its deal if that Less stock were retired. Was there any similar conversation about the Raab stock that also represented an outlay of corporate funds of some $4,800.00 in this case?

A. I don't recall that. There may have been, but I don't recall.

Q. And the Raab stock, what was done with the Raab stock, Mr. McDonough?

A. It was cancelled, according to the stock records of the corporation. Do you want to see them? C

Q. Yes, could we see that?

A. Here, I can find it for you -- off the record.

(DISCUSSION OFF THE RECORD.)

MR. SWEET: Would you mark this, please?

(Whereupon, the above mentioned document was marked Plaintiff's Exhibit No. 4 for Identification.)

BY MR. SWEET:

Q. Now, Mr. McDonough, Exhibit No. 4 here is the -- would you tell us what Exhibit 4 is, please?

A. That is the Taber Instrument Corporation, Class "A", Stock Record Book.

Q. Now, what was the distinction between "Class A" and "Class B" stock of Taber Instrument Corporation?

A. Well, the basic difference was that Class "A" was non-voting stock, and Class "B" was voting stock.

Q. But both Classes would share equally in a liquidation distribution of the company?

A. Under the terms of the Teledyne-Taber Contract, both Classes shared equally.

Q. All right. Did you have any discussion at the time you were negotiating the purchase of the Raab stock with Mr. Ness; did you have any discussion about the price that had been paid by Taber Instrument Corporation in May of 1966 for the Less stock? Did either you or Mr. Ness bring up that subject?

A. I don't recall it.

Q. Do you recall whether you made any comment to Mr. Ness as to whether $8.00 per share plus the Profit Sharing Benefits was a reasonable price, or a fair price, or anything along those lines?

A. I was not a negotiator, Mr. Sweet. I simply conveyed the offer which my client had authorized me to make.

Q. Well, I asked you whether in fact you did make any such remark?

A. No, I did not. Well, I will withdraw that answer. I may have discussed with fairness in connection with the defense to his pending lawsuit, Mr. Ness and I may have discussed that. I know that Mr. Ness knew of the negotiations to settle the Less case, but exactly whether the words "fair" and "reasonable" were used at any time, I don't remember.

Q. The allegations of wrong-doing on the part of Mr. Raab that were asserted in the State Court to be brought for the Profit Sharing monies, or at least the fact that those allegations were asserted in that State Court, has been asserted as an affirmative defense in this currently pending case in the U.S. District Court; is that right, Mr. McDonough?

A. I believe that is correct.

Q. Now, is there, in your possession any documentary evidence or photographs, or any other type of evidence in support of or pertaining to those allegations of wrong-doing?

A. I refuse to answer that question on the grounds that it is privileged as between attorney and client, and the law would not allow me to answer that question.

Q. Just to clarify the record, Mr. McDonough, I would like to point out that I am not asking you to divulge or produce items that might consist of confidential communications between your client and yourself, or items which would consist of attorney's work product. I am limiting my question to items of evidence that would be discoverable in the hands of Taber Instrument Corporation or the other defendants to this action. Now, I would ask you the question again, in that light. Have you any such items of evidence that I have just described, that are in your possession?

A. My answer must not be deemed acquiescent in your prefatory remarks. The answer is the same.

MR. SWEET: Would you mark this, please?

(Whereupon, the document referred to was marked Plaintiff's Exhibit No. 5 for Identification.)

MR. SWEET: And would you mark this, please?

(Whereupon, the above mentioned document was marked Plaintiff's Exhibit No. 6 for Identification.)

BY MR. SWEET:

Q. Now, let me ask you about Exhibit No. 5 first.

Is Exhibit No. 5 a counterpart of the -- or original counterpart of the Release between -- signed by Mr. Raab in favor of Tabor Instrument Corporation, Ralph F. Taber and Warren J. Hildebrandt and individuals and Trustees and so on?

A. That is one of the documents that I just gave you now. Yes, that would appear to be a duplicate-original.

Q. All right. Now, Plaintiff's Exhibit No. 6 in this Raab action, is the letter from you, Mr. McDonough to Mr. Kaufman, dated June 20, 1966, which was marked as Plaintiff's Exhibit No. 107 in the Less action?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Mr. McDonough, were you aware at the time that you were negotiating with Mr. Ness over the purchase of the Raab stock, that there had been earlier negotiations between Doctor D'Angelo on behalf of Taber Instrument Corporation and Mr. Raab, for the purchase of his stock?

A. I refuse to answer that on the grounds that it would be privileged between attorney and client, and the law would not allow me to answer that.

Q. All right. Now, that is all the questions that I have on the Raab case, I think.

A. Okay.

MR. SWEET: Do you have any questions, Mr. Hitchcock?

MR. HITCHCOCK: No.

MR. SWEET: Well, let me ask you one further thing before I forget.

BY MR. SWEET:

Q. Did you have any discussion with Doctor D'Angelo in April or May of 1966 concerning the purchase or possible purchase of the Raab stock?

A. I refuse to answer that on the same grounds as stated in the Raab deposition, on the grounds that such conversations would be of confidential and privileged nature as between attorney and client.

Q. Well, for the purpose of clarifying this record, Mr. McDonough, would you clarify the basis of your objection and the status, how your dealings with Doctor D'Angelo, who was not an employee of Taber Instrument Corporation, would be subject to privilege?

A. I will not, and my failure to comment on your prefatory remark again must not be deemed acquiescence.

Q. Well, when you refer to the same grounds as you asserted in the examination in the Less case for refusing to disclose dealings or conversations between yourself and Doctor D'Angelo, you are referring to the statement that you made in that examination, that Doctor D'Angelo may have been an ad hoc agent of Tabor Instrument Corporation?

A. I believe that is correct, yes.

MR. SWEET: Would you please mark this?

(Whereupon, the above mentioned document was marked Plaintiff's Exhibit No. 7 for Identification.)

MR. SWEET: Exhibit No. 7 is a stipulation of Discontinuance, dated May 26, 1966.

(EXAMINATION TERMINATED)

Defendants' notice to take deposition of plaintiff.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT

Defendants

PLEASE TAKE NOTICE that on September 11, 1970, at 10 A.M. at the offices of PHILLIPS, LYTLE, HITCHCOCK, BLAINE and HUBER, 1330 Marine Trust Building, Buffalo, New York, the defendants in the above entitled action will take the deposition of the plaintiff JUNIA E. RAAB. The deposition will be taken upon oral questions, pursuant to the Federal Rules of Civil Procedure before a notary public, or any other officer authorized by law to administer oaths.

Dated: August 26, 1970

McDONOUGH BOASBERG McDONOUGH & BELTZ
Attorneys for Defendants Taber Instrument Corporation et al
Office and P. O. Address
930 Walbridge Building
Buffalo, New York 14202

TO:

HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff
1202 Marine Trust Bldg.
Buffalo, N.Y. 14203

PHILLIPS LYTLE HITCHCOCK BLAINE & HUBER
Attorneys for Defendant Joseph P. D'Angelo
1330 Marine Trust Bldg.
Buffalo,New York 14203

Note of Issue.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff
-vs-
TABER INSTRUMENT CORPORATION,
a New York corporation
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN, and
WARREN J. HILDEBRANDT,
Defendants

NOTE OF ISSUE
CIVIL ACTION
No. 1967-190

HEFFERNAN, SWEET & MURPHY (formerly Heffernan, Harrison, Sweet & Gruber) 1202 Marine Trust Building, Buffalo, New York, and IOUIS LOSS, Langdell Hall, Cambridge, Massachusetts, Attorneys for Plaintiff.

McDONOUGH, BOASBERG, McDONOUGH & BELTZ, Attorneys for Defendants, Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt, 930 Walbridge Building, Buffalo, New York,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, Attorneys for Defendant, Joseph P. D'Angelo, 1330 Marine Trust Building, Buffalo, New York.

The last pleading was seved in this case on June 15th, 1967.

Trial desired at Term of Court commencing November 10th, 1970.

Note of Issue.

The specific nature and object of this action is rescission, under Sections 10 (b), 27 and 29 (b) Securities Exchange Act of 1934 and Rule 10 b-5 of the Securities and Exchange Commission.

The Clerk of the United States District Court will please file this Note of Issue for the Trial Term of this Court to be held November 10th, 1970 at Buffalo, New York.

Dated : October 27th, 1970

HEFFERNAN, SWEET & MURPHY
1202 Marine Trust Building
Buffalo, New York 14203

and

LOUIS LOSS
Langdell Hall,
Cambridge, Massachusetts

Attorneys for Plaintiff.

Order Permitting Plaintiff to Serve and File Note of Issue for March 9, 1971 Term of Court, With Annexed Affidavit of David L. Sweet.

At A SPECIAL TERM OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, held in the United States Court House in the City of Buffalo, New York, on March 2nd, 1971

PRESENT : HONORABLE JOHN T. CURTIN
United States District Judge

JUNIA E. RAAB,
Plaintiff

vs.

CIVIL ACTION
No. 1967-190

TABER INSTRUMENT CORPORATION,
a New York corporation
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN, and
WARREN J. HILDEBRANDT,
Defendants

ORDER

On the annexed affidavit of DAVID L. SWEET, sworn to March 2nd, 1971, it is

ORDERED that the plaintiff is hereby given permission to serve and file a note of issue for the March 9th, 1971 term of court nunc pro tunc. Service and filing thereof to be made by March 2nd, 1971.

JOHN T CURTIN
J. D.C.

March 2, 1971

Order Permitting Plaintiff to Serve and File Note of Issue for March 9, 1971 Term of Court, With Annexed Affidavit of David L. Sweet.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA B. RAAB,
Plaintiff

vs.

CIVIL ACTION
NO. 1967-190

TABER INSTRUMENT CORPORATION,
a New York corporation
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
~~BENJAMIN MANASEN, and~~
WARREN J. HILDEBRANDT
Defendants

STATE OF NEW YORK : SS
COUNTY OF ERIE :

DAVID L. SWEET being duly sworn deposes and says :

1. I am a member of the firm of HEFFERNAN, SWEET & MURPHY, attorneys for the plaintiff in this action and am fully familiar with the pleadings and proceedings herein.

2. A note of issue was duly filed in this action for the November 1970 term but through inadvertence no note of issue was filed for the term commencing March 9th, 1971.

3. There will be no prejudice to opposing parties if the court permits the filing of such a note of issue for the March 9th, 1971 term, nunc pro tunc.

4. No previous application has been made for the relief sought herein.

WHEREFORE, deponent requests an order of the

BEST COPY AVAILABLE

Order Permitting Plaintiff to Serve and File Note of Issue for March 9, 1971 Term of Court, With Annexed Affidavit of David L. Sweet.

Court permitting the service and filing of a note of issue for the March 9th, 1971 term, nunc pro tunc.

David L Sweet

Subscribed and sworn to before
me this 2nd day of March, 1971

Notary Public, Erie County, N.Y.

[illegible]
Notary Public, State of New York
Qualified in Erie County
My Commission expires Mar. 30, 1974

Note of Issue.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN, and
WARREN J. HILDEBRANDT,
Defendants

NOTE OF ISSUE

CIVIL ACTION
NO. 1967-190

HEFFERNAN, SWEET & MURPHY (formerly Heffernan, Harrison, Sweet & Gruber) 1202 Marine Trust Building, Buffalo, New York, and LOUIS LOSS, Langdell Hall, Cambridge, Massachusetts, Attorneys for Plaintiff.

McDONOUGH, BOASBERG, McDONOUGH & BEITZ, Attorneys for Defendants, Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt, 930 Walbridge Building, Buffalo, New York,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, Attorneys for Defendant, Joseph P.D'Angelo, 1330 Marine Trust Building, Buffalo, New York.

The last pleading was served in this case on June 15th, 1967.

Trial desired at Term of Court commencing March 9th, 1971.

The specific nature and object of this action is rescission, under Sections

Note of Issue.

10 (b), 27 and 29 (b) Securities Exchange Act of 1934 and Rule 10 b-5 of the Securities and Exchange Commission.

The Clerk of the United States District Court will please file this Note of Issue for the Trial Term of this Court to be held March 9, 1971, at Buffalo, New York.

Dated : March 1st, 1971

HEFFERNAN, SWEET & MURPHY
1202 Marine Trust Building
Buffalo, New York 14203

and

LOUIS LOSS
Langdell Hall
Cambridge, Massachusetts

Attorneys for Plaintiff

Notice of pretrial conference on April 2, 1971.

United States District Court
FOR THE
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

v.

TABER INSTRUMENT CORPORATION,
et al.

No. Civ-1967-190

TAKE NOTICE that the above-entitled case has been set for pretrial conference at 2:00 P.M., on April 2, 1971, at Judge John T. Curtin's Chambers, 614 U.S. Courthouse, Buffalo, N.Y.

Date March 11, 1971

John K. Adams Clerk.

By .... Deputy Clerk.

To ✓Heffernan, Sweet & Murphy
Louis Loss
Attorneys for Plaintiff

McDonough, Boasberg, McDonough & Beltz
Phillips, Lytle, Hitchcock, Blaine & Huber
Attorneys for Defendants

Notice of pretrial conference on April 2, 1971.

PRETRIAL ORDER - CIVIL CASES

Prior to the date set for pretrial conference by the attached notice, the parties shall mail to the court and to opposing counsel the following:

1. A detailed joint statement of facts.

   (a) In the alternative, each counsel shall submit a detailed statement of fact from his viewpoint of the case. If this course is followed, each side shall submit a statement setting forth what efforts were made with opposing counsel to prepare a joint statement and why a joint statement could not be submitted.

2. A statement of the possible factual and legal issues to be resolved by a trial.

3. A list of exhibits to be used, with a brief description of each. If it is anticipated that an exhibit will be used only to impeach an opposing party's witness, it need not be on the list sent to opposing counsel. However, counsel should inform the court in writing of the exhibit and its possible use.

4. A list of possible witnesses, with a brief resume of their expected testimony. If it is anticipated that a witness will only be used for rebuttal, this information need not be given to opposing counsel, but the court should be informed of the name of the witness and given a summary of the expected testimony.

5. A list of depositions which counsel intends to read at trial.

6. Memorandum dealing with legal problems which may occur.

If the above information is not on hand prior to the pretrial conference, it will not be held and other appropriate action will be taken by the court.

John T. Curtin
JOHN T. CURTIN
United States District Judge

January 27, 1971

Order re Further Depositions.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH P. LESS,

Plaintiff

-vs- Civil 1967-182

TABER INSTRUMENT CORP., et al.,

Defendants

JULIA E. BARD,

Plaintiff

-vs- Civil 1967-190

TABER INSTRUMENT CORP., et al.,

Defendants

On April 2, 1971 at the pretrial conference held in the above matters, it was represented by James P. Heffernan, attorney for the plaintiffs, that it was necessary to take the depositions of Mr. Singleton, F. Letts, and a Mr. Himmelfarb. The first two witnesses are in California and the third is in Mexico. Counsel agreed that two months was sufficient time to take the depositions and have transcript prepared. Robert M. Hitchcock, attorney for the defendant, will then be given an opportunity to take the depositions of Mr. Sweet and Mr. Murphy. These depositions are to be taken as soon after the first three as possible.

At the pretrial conference, the attorneys notified the court that Harold J. Boreanaz, attorney for another defendant, was not notified of the pretrial meeting. The clerk informed the court that no appearance has been made to date by Mr. Boreanaz. Such appearance, with answer and other available papers, shall be made immediately.

Further pretrial meeting will be held on July 9, 1971. Pretrial statement required by order of this court shall be filed not later than June 25, 1971.

Further adjournment of the taking of depositions will not be granted by the court without good cause shown in writing.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: April 6, 1971.

Note of Issue.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN and
WARREN J. HILDEBRANDT,
Defendants.

NOTE OF ISSUE

CIVIL ACTION
NO. 1967-190

HEFFERNAN, SWEET & MURPHY (Formerly Heffernan, Harrison, Sweet & Gruber), 1202 Marine Trust Building, Buffalo, New York, and LOUIS LOSS, Langdell Hall, Cambridge, Massachusetts, Attorneys for Plaintiff.

McDONOUGH, BOASBERG, McDONOUGH & BELTZ, Attorneys for Defendants, Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt, 930 Walbridge Building, Buffalo, New York.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, Attorneys for Defendant, Joseph P. D'Angelo, 1330 Marine Trust Building, Buffalo, New York.

The last pleading was served in this case on June 15, 1967.

Trial desired at Term of Court commencing November 9, 1971.

The specific nature and object of this action is rescission, under Sections 10(b), 27 and 29(b), Securities Exchange

Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission.

The Clerk of the United States District Court will please file this Note of Issue for the Trial Term of this Court to be held November 9, 1971, at Buffalo, New York.

Dated: October 28, 1971.

HEFFERNAN, SWEET & MURPHY
1202 Marine Trust Building
Buffalo, New York 14203

and

LOUIS LOSS
Langdell Hall
Cambridge, Massachusetts

Attorneys for the Plaintiff

TO: McDONOUGH, BOASBERG, McDONOUGH & BELTZ
930 Walbridge Building
Buffalo, New York 14202
Attorneys for the Defendants,
Taber Instrument Corporation,
Ralph F. Taber
Benjamin Manasen and
Warren J. Hildebrandt

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
1330 Marine Trust Building
Buffalo, New York 14203
Attorneys for the Defendant,
Joseph P. D'Angelo

Note of Issue.

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

GERALDINE A. SHARRY, being duly sworn, deposes and says that on the 28th day of October, 1971, she served the within Note of Issue upon the following:

McDONOUGH, BOASBERG, McDONOUGH & BELTZ
930 Walbridge Building
Buffalo, New York 14202
Attorneys for the Defendants,
Taber Instrument Corporation,
Ralph F. Taber,
Benjamin Manasen and
Warren J. Hildebrandt

and

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
1330 Marine Trust Building
Buffalo, New York 14203
Attorneys for the Defendant,
Joseph P. D'Angelo

by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at Buffalo, in said county of Erie, directed to said attorneys at the above addresses, those being the addresses within the State designated by them for that purpose upon the preceding papers in this action, or the places where they then kept offices between which places there then was and now is a regular communication by mail. Deponent is over eighteen (18) years of age, not a party to this action and resides at 111 Edson Street, West Seneca, New York.

/s/ Geraldine A. Sharry

Sworn to before me this 28th
day of October, 1971.

/s/ Eugene J. Murphy

Notice of pretrial conference on August 17, 1972.

United States District Court

FOR THE

Western District of New York

JUNIA E. RAAB

v.

TABER INSTRUMENT CORPORATION, et al.

No. Civil-1967-190

TAKE NOTICE that the above-entitled case has been set for final pretrial conference at 9:30 a.m., on August 17, 1972, at the office of the undersigned, 414 U.S. Courthouse, Buffalo, New York.

It is requested that counsel be in a position to discuss the narrowing of the issues in dispute, the marking of exhibits to be used on the trial, the possibility of settlement of the action, and any other matters which may be of assistance to the Court and counsel in effecting disposition of this proceeding.

Pretrial Statements in accordance with the attached Order are to be filed with the undersigned and opposing counsel at least three days prior to the conference date.

EDMUND F. MAXWELL
United States Magistrate
(716) 842-3416

Dated: July 13, 1972

To: Heffernan, Sweet & Murphy
Attorneys at Law
Attn: Mr. David L. Sweet
1202 Marine Trust Building
Buffalo, New York 14203

Mr. Louis Loss
Attorney at Law
Langdell Hall
Cambridge, Massachusetts

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
Attn: Mr. Charles J. McDonough
930 Walbridge Building
Buffalo, New York 14202

Phillips, Lytle, Hitchcock, Blaine & Huber
Attorneys at Law
Attn: Mr. Robert M. Hitchcock
1330 Marine Trust Building
Buffalo, New York 14203

Notice of pretrial conference on August 17, 1972.

PRETRIAL ORDER - CIVIL CASES

Prior to the date set for pretrial conference by the attached notice, the parties shall mail to the court and to opposing counsel the following:

1. A detailed joint statement of facts.

   (a) In the alternative, each counsel shall submit a detailed statement of fact from his viewpoint of the case. If this course is followed, each side shall submit a statement setting forth what efforts were made with opposing counsel to prepare a joint statement and why a joint statement could not be submitted.

2. A statement of the possible factual and legal issues to be resolved by a trial.

3. A list of exhibits to be used, with a brief description of each. If it is anticipated that an exhibit will be used only to impeach an opposing party's witness, it need not be on the list sent to opposing counsel. However, counsel should inform the court in writing of the exhibit and its possible use.

4. A list of possible witnesses, with a brief resume of their expected testimony. If it is anticipated that a witness will only be used for rebuttal, this information need not be given to opposing counsel, but the court should be informed of the name of the witness and given a summary of the expected testimony.

5. A list of depositions which counsel intends to read at trial.

6. Memorandum dealing with legal problems which may occur.

If the above information is not on hand prior to the pretrial conference, it will not be held and other appropriate action will be taken by the court.

John T Curtin
JOHN T. CURTIN
United States District Judge

January 27, 1971

Notice of pretrial conference on December 13, 1972.

United States District Court
FOR THE
Western District of New York

JUNIA E. RAAB

v.

TABER INSTRUMENT CORPORATION,
et al.

No. Civ-1967-190

TAKE NOTICE that the above-entitled case has been set for final pretrial conference at 9:00 a.m., on December 13, 1972, at the office of the undersigned, 414 U.S. Courthouse, Buffalo, New York.

It is requested that counsel be in a position to discuss the narrowing of the issues in dispute, the marking of exhibits to be used on the trial, the possibility of settlement of the action, and any other matters which may be of assistance to the Court and counsel in effecting disposition of this proceeding.

Pretrial Statements in accordance with the attached Order are to be filed with the undersigned and opposing counsel at least three days prior to the conference date.

EDMUND F. MAXWELL
United States Magistrate
(716) 842-3416

Dated: November 17, 1972

To: Heffernan, Sweet & Murphy
Attorneys at Law
Attention: Mr. David L. Sweet
1202 Marine Trust Building
Buffalo, New York 14203

Mr. Louis Loss
Attorney at Law
Langdell Hall
Cambridge, Massachusetts

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
Attention: Mr. Charles J. McDonough
930 Walbridge Building
Buffalo, New York 14202

Phillips, Lytle, Hitchcock, Blaine & Huber
Attorneys at Law
Attention: Mr. Robert M. Hitchcock
1330 Marine Trust Building
Buffalo, New York 14203

1491

Notice of pretrial conference on December 13, 1972.

PRETRIAL ORDER - CIVIL CASES

Prior to the date set for pretrial conference by the attached notice, the parties shall mail to the court and to opposing counsel the following:

1. A detailed joint statement of facts.

   (a) In the alternative, each counsel shall submit a detailed statement of fact from his viewpoint of the case. If this course is followed, each side shall submit a statement setting forth what efforts were made with opposing counsel to prepare a joint statement and why a joint statement could not be submitted.

2. A statement of the possible factual and legal issues to be resolved by a trial.

3. A list of exhibits to be used, with a brief description of each. If it is anticipated that an exhibit will be used only to impeach an opposing party's witness, it need not be on the list sent to opposing counsel. However, counsel should inform the court in writing of the exhibit and its possible use.

4. A list of possible witnesses, with a brief resume of their expected testimony. If it is anticipated that a witness will only be used for rebuttal, this information need not be given to opposing counsel, but the court should be informed of the name of the witness and given a summary of the expected testimony.

5. A list of depositions which counsel intends to read at trial.

6. Memorandum dealing with legal problems which may occur.

If the above information is not on hand prior to the pretrial conference, it will not be held and other appropriate action will be taken by the court.

John T Curtin
JOHN T. CURTIN
United States District Judge

July 24, 1972

100

Notice of pretrial conference on February 7, 1973.

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
BUFFALO, NEW YORK 14202

EDMUND F. MAXWELL

Area Code 716
842-3416

January 16, 1973

Heffernan, Sweet & Murphy
Attorneys at Law
Attn: Mr. David L. Sweet
1202 Marine Trust Building
Buffalo, New York 14203

Mr. Louis Loss
Attorney at Law
Langdell Hall
Cambridge, Massachusetts

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
Attn: Mr. Charles J. McDonough
930 Walbridge Building
Buffalo, New York 14202

Phillips, Lytle, Hitchcock, Blaine & Huber
Attorneys at Law
Attn: Mr. Robert M. Hitchcock
1330 Marine Trust Building
Buffalo, New York 14203

Re: Raab v. Taber Instrument
Civil 1967-190

Gentlemen:

The final pretrial conference originally scheduled for December 28, 1972 has been rescheduled for Wednesday, February 7, 1973 at 9:00 a.m. at the office of the undersigned.

Very truly yours,

EDMUND F. MAXWELL
United States Magistrate

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB and
WARREN J. HILDEBRANDT,
Defendants.

Civil Action No.
1967-182

PRETRIAL STATEMENT OF PLAINTIFFS

JUNIA E. RAAB,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN and
WARREN J. HILDEBRANDT,
Defendants.

Civil Action No.
1969-190

The plaintiffs in these actions are former shareholders of Taber Instrument Corporation (TIC) whose shares of that corporation were purchased by the corporation in transactions in which the defendants violated the Securities and Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. The sale by the plaintiff Less of 14,100 shares took place on May 4, 1966, at the price of $10.00 per share, or $141,000.00. The sale by the plaintiff Raab of 600 shares took place on June 3, 1966, at the price of $8.00 per share, or $4,800.00. In each case, TIC itself was the purchaser. However, TIC promptly transferred the Less shares to defendants D'Angelo and Himmelfarb, for the same price of $10.00 per share.

These causes of action arise under the Securities and Exchange Act of 1934 and Rule 10B-5 of the Securities and Exchange Commission and are based upon the failure of the defendants to disclose to the plaintiffs or their representatives that negotiations were being carried on for the acquisition of TIC by Teledyne, Inc., at a price greatly in excess of the prices paid the plaintiffs for their TIC shares and that had the plaintiffs been informed of those negotiations, they would not have sold their shares for the prices they received.

The plaintiff Less, a long-time Director and officer of TIC, was discharged by TIC in January of 1965, as was his brother Stanley. At the time of his discharge, Joseph F. Less was Executive Vice President of TIC. The defendant D'Angelo and his company, Daycon Investors, had recently been engaged by TIC to carry on certain activities, including possible reorganization of TIC, and D'Angelo was instrumental in having Less discharged. D'Angelo was elected a Director and Executive Vice President of TIC.

In early 1965 soon after Less was discharged, D'Angelo negotiated with Less and his attorneys (predecessors of the present firm of Heffernan, Sweet & Murphy) for the purchase by TIC of his 14,100 shares of TIC and in April of 1965 made an offer for the stock of about $2.00 per share, which was rejected by Less on April 30, 1965. At about the same time, Attorney Charles J. McDonough, representing TIC, approached Less' attorneys and threatened action against Less unless he sold his stock to TIC at a price it proposed.

Joseph F. Less' son Donald had been employed by TIC until 1964, after which he began a business for the manufacture of pressure transducers, first operating under an assumed business name and then forming a corporation, Viatran Corporation, in January of 1965.

There followed certain litigation in State Supreme Court, including a suit by TIC against Joseph F. Less, Donald Less, Stanley Less and others alleging misappropriation of trade secrets and confidential information in connection with the manufacture of pressure transducers,and suits by Joseph F. Less, Donald Less and Stanley Less against TIC and the Trustees of its Profit Sharing Plan for moneys due them under that Plan.

In the spring of 1966, plaintiff Less was approached by Attorney Noel E. Bartlo, who identified himself as the agent for an undisclosed principal who was interested in acquiring Less' shares in TIC. Less referred him to Attorneys Eugene J. Murphy and David L. Sweet, with whom Bartlo pursued his negotiations, without ever disclosing the identity of his principal or the reason for his interest in the stock. Less then informed Ralph F. Taber of the interest that had been shown in his stock by Bartlo on behalf of an unidentified person. Taber told Less that he too was interested in acquiring the stock and that he would have his representative contact Less' attorneys. Warren J. Hildebrandt, a Director of TIC, then called Attorney Murphy and arranged for a meeting at Attorney McDonough's office on April 1, 1966, attended by Less, Murphy, Sweet, Hildebrandt and McDonough.

At that meeting, McDonough and Hildebrandt were told about the overtures made by Bartlo and were also told that Less and his attorneys suspected that D'Angelo might be the undisclosed principal for whom Bartlo was acting. Hildebrandt and McDonough said that Taber would like to acquire the shares and that they would submit an offer shortly.

There soon followed negotiations between Attorneys McDonough and Sweet, resulting in an agreement for TIC to buy the 14,100 shares for $10.00 per share, with 25% of the purchase price to be paid at closing and the balance over a period of time and secured by a promissory note. It was also agreed at that time that mutual releases would be exchanged among all the parties to the then pending litigation and that Joseph F. Less, Donald Less and Stanley Less would receive their Profit Sharing payments from the Trustees of the Profit Sharing Plan.

On or about April 4, 1966, about three days after the April 1, 1966, meeting at McDonough's office, D'Angelo went to Less' shop on Rhode Island Street in Buffalo, New York, and told Less he was the party for whom Bartlo was acting and that he was trying to get the stock for certain other individuals who were interested in taking a larger part in TIC, one of whom was a Chinese engineer then working at TIC. Less didn't trust D'Angelo and didn't want any further dealings with him and told him so, rejecting D'Angelo's offers. D'Angelo did not then, or ever, tell Less about the Teledyne negotiations.

As to the acquisition negotiations concealed from the plaintiffs in these cases, pretrial discovery has established that in early February, 1966, D'Angelo and Taber went to Los Angeles, California, and met with representatives of Teledyne, Inc. ; that D'Angelo and Taber had in mind the possible acquisition of TIC by Teledyne, Inc.; that D'Angelo and Taber entered into a finder's fee agreement written on stationery of the International Hotel in Los Angeles, California, dated February 3, 1966, whereby Taber, on behalf of TIC, agreed to pay D'Angelo a finder's fee of 5% in the event of the acquisition of TIC by Teledyne, Inc.; that the subject of such an acquisition was broached by D'Angelo to Dr. Singleton, the head of Teledyne, Inc., during that visit; that negotiations were carried out subsequently between D'Angelo and Singleton, with the knowledge and consent of Ralph F. Taber; that by April 1, 1966, Teledyne, Inc., had indicated that it would pay $2.5 Million for TIC and Taber was then demanding $5 Million; that between April 1, 1966, and May 1, 1966, negotiations continued; that by May 1, 1966, a compromise price of $3.8 Million was discussed; that a comprehensive draft agreement for an acquisition at the $3.8 Million price was sent to D'Angelo by counsel for Teledyne, Inc., on or about May 6, 1966; that, following further negotiations, an agreement for the acquisition for $3.8 Million in Teledyne, Inc., stock was executed on July 27, 1966.

Arrangements were made by Ralph F. Taber and Benjamin Manasen to redistribute Less' 14,100 shares to other insiders, namely, defendants D'Angelo and Himmelfarb. By an agreement dated May 19, 1966, Taber gave D'Angelo the option to purchase for

$10.00 per share 7,000 of the 14,100 shares just acquired from Less. Himmelfarb, a close and long-time friend of both Taber and Manasen, was permitted to "lend" $100,000.00 to TIC on June 3, 1966, with the understanding that he would be repaid in TIC stock. Himmelfarb entered into this transaction upon assurances from Taber and Manasen that this was an excellent time to make his very first investment in the stock of their corporation. Just over one month later, on July 7, 1966, TIC consummated the bargain by transferring 7,100 of the Less shares to Himmelfarb at a price of $10.00 per share and deducting $71,000.00 from the $100,000.00 "loan" balance.

On July 27, 1966, the Board of Directors of TIC, consisting of defendants Taber, Manasen and Hildebrandt, authorized the sale of the remaining 7,000 of Less' shares to D'Angelo for $10.00 per share. Incredibly, this action was taken at the same meeting at which the Board authorized execution of the agreement for acquisition of TIC by Teledyne for $3.8 Million in Teledyne stock, or approximately $49.00 per TIC share.

D'Angelo had exercised his "option" to purchase the 7,000 shares by a letter to TIC dated June 11, 1966, in which he said "I would appreciate having these shares registered in my name prior to the signing of the Teledyne-Taber contract for acquisition".

Plaintiff Raab's 600 shares of TIC were purchased by TIC on June 3, 1966, for $8.00 per share. Raab also had been compelled to bring suit against TIC and the Trustees of the

Profit Sharing Plan for benefits due him. That suit was terminated and the benefits claimed were paid to Raab at the time of the purchase of his TIC shares. Raab's shares were not resold to insiders or their cronies, as were Less' shares, but were retired.

Just as in the Less transaction, no disclosure was made to Raab concerning the Teledyne acquisition negotiations then progressing.

When Teledyne learned about the dealings between TIC and its shareholders, Less and Raab it demanded an indemnification agreement and a pledge of stock as protection against liability to Less and Raab arising out of the purchases of their stock. Accordingly, the acquisition agreement executed by TIC and Teledyne dated July 27, 1966, contains the following provision:

> "7.18 Delivery of Pledge Agreements. TABER has, by appropriate data contained in Exhibit "I", informed TELEDYNE of TABER's purchase of an aggregate of 14,700 shares of its capital stock from certain of its former shareholders. In order to assure TELEDYNE (and secondarily Ralph Taber) against any liabilities, obligations, losses, costs and expenses with reference to said prior purchases of stock, TABER hereby agrees to pledge to TELEDYNE for a period of two (2) years shares of TELEDYNE Common Stock having an aggregate value of $550,000.00 (which value shall be computed in accordance with the provisions of Paragraph 3.2 above), out of the shares received by TABER pursuant to Paragraph 3.1 above. The shares so agreed to be pledged shall be deemed to be part of the TELEDYNE shares distributable in liquidation to Benjamin Manasen and/or his nominee and Dr. Joseph D'Angelo as stockholders of TABER. TABER shall deliver on the Closing Date a Pledge Agreement in the form of Exhibit "P" executed by it and by Mr. Manasen and Dr. D'Angelo.
>
> Notwithstanding any distribution by TABER of the equitable interests in said pledged shares, said Pledge Agreement shall remain effective in accordance with its provisions for the term thereof."

After the execution of the July 27, 1966, acquisition agreement, further negotiations took place between Teledyne and TIC concerning principally the number of Teledyne shares to be paid TIC and the matter of the indemnification and pledge agreement regarding the Less and Raab transactions. These negotiations resulted in a supplemental agreement dated December 12, 1966, amending the July 27, 1966, agreement in certain respects, including: changing the consideration for the deal to 45,000 Teledyne shares; extending the closing date; adding to the list of obligations to be borne by TIC, any liability to Joseph F. Less arising out of the purchase of his stock; amending the pledge agreement requirement by eliminating reference to Raab's 600 shares, changing the parties to the pledge agreement by substituting Himmelfarb for Manasen and adding Ralph F. Taber;and reducing the amount of the pledge to $300,000.00 in Teledyne shares.

The acquisition was consummated on December 30, 1966, in accordance with the July 27, 1966, agreement and the supplemental agreement of December 12, 1966. Pursuant to a pledge agreement dated December 8, 1966, Taber, Himmelfarb and D'Angelo each pledged 1,175 shares of Teledyne, Inc., stock with the Liberty National Bank & Trust Company, as escrow agent, to be applied against any liability to Less with respect to the purchase of his 14,100 shares by TIC and their resale to Himmelfarb and D'Angelo.

Mr. McDonough has recently informed us that, through stock splits and stock dividends, the shares held in escrow by

Liberty have increased to 16,527 shares.

Documents furnished in the course of discovery indicate that, through the acquisition of TIC and its liquidation, TIC's shareholders became entitled to approximately .59 shares of Teledyne for each share of TIC, subject to proportionate assessments for D'Angelo's 5% finder's fee and for expenses of the sale and liquidation, including attorneys' fees. The final amount of those expenses has not been furnished us and we lack certain other information about the liquidation which is required for an accurate determination of the net number of Teledyne shares Less and Raab would have received. However, it appears that Less, on the liquidation of TIC, would have received approximately 8,000 Teledyne shares and Raab approximately 350 Teledyne shares.

Actual delivery to TIC shareholders of their Teledyne shares was made on or about May 16, 1967. At or about that time Teledyne shares were trading on the New York Stock Exchange at upwards of $180.00 per share. By the end of June, Teledyne was trading at about $205.00 per share, and by November, 1967, it reached $286.00 per share.

The plaintiffs would have sold their Teledyne shares in 1967, for reasons which will be brought out at trial.

Both plaintiffs brought timely suits for rescission of the purchases of their TIC stock, tendered restitution of all that they received under the purchase contracts, and asked that they receive, on liquidation of TIC, their portion of the 45,000 Teledyne shares or the monetary equivalent of that portion.

Rule 10b-5 makes it unlawful, by the use of any means or instrumentality of interstate commerce or the mails, to make any untrue statement of material fact or to omit to state a material fact in connection with the purchase or sale of any security.

The effect of §29b of the Securities and Exchange Act is to render void any contract made in violation of Rule 10b-5, as regards the rights of any person having violated the rule with respect to such contract.

The issue in these cases of whether the plaintiffs are entitled to rescission of the transactions whereby their stock was purchased by reason of the failure of the defendants to inform them of a material fact within the meaning of Rule 10b-5, namely the Teledyne negotiations, is not met by the defendants' allegations.

In neither case have the defendants alleged that a tender of rescission was ever made by the defendants and refused by the plaintiffs. In both actions, the defendants have raised, as affirmative defenses, matters which may be relevant to the question of the nature and amount of the consideration given the plaintiffs for their stock, but which are not relevant to the issue of whether the plaintiffs are entitled to rescission of the stock purchase transactions by reason of the nondisclosure of the Teledyne negotiations. As to Less, these matters include alleged wrongdoing by him and others with regard to TIC's trade secrets, alleged misappropriation of property, the suit by TIC against the plaintiff Less and others, the suits for the profit sharing moneys, and allegations that the various actions were settled and moneys paid as part of the stock purchase transactions. As to Raab also, the defendants have interposed allegations to the effect that the settlement of his suit for profit sharing moneys was an integral part of the transactions in which his stock was purchased.

The reason those matters do not meet that issue in these cases is that, if rescission is granted to the plaintiffs, the Court may condition the judgment upon the restoration of any consideration found to have been given to the defendants for the stock, so as to restore them to the status quo ante. See: 3 *Loss, Securities Regulation* 1793, note 372; *Gould v. Tricon Inc.*, 272 Fed. Supp. 385; *Parker v. Baltimore Paint and Chemical Corp.*, 39 F.R.D. 567, esp. at p. 569 (D. Colo., 1966).

Whether any value attributable to the aforesaid other considerations alleged by the defendants to have been given the plaintiffs for their stock would have a bearing on the question of the plaintiffs' alternative demands for money damages other than rescissional damages would, of course, be a matter to be determined at trial. On this point, it is noteworthy that, in the Less case at least, no value was apparently assigned by the defendants to such matters when they immediately resold his stock to Himmelfarb and D'Angelo for the same $10.00 per share price Less received.

It will be seen that the principal issues of fact and law indicated above are common to both of these cases. Therefore, in the interests of orderly administration of justice and the avoidance of costly and time-consuming duplication of proof, the cases should be consolidated for trial.

EXHIBITS

Over 200 exhibits have been marked in the course of discovery, many of which will be used by plaintiffs upon trial.

POSSIBLE WITNESSES

Joseph F. Less, Junia E. Raab, Ralph F. Taber, Joseph P. D'Angelo, Benjamin Manasen, Warren J. Hildebrandt, Charles J. McDonough, David L. Sweet, Eugene J. Murphy, Charles H. Till, Vice President of Marine Midland Bank - Western, Noel E. Bartlo, and Leonard C. Ulrich of S. D. Lunt & Co.

DEPOSITIONS

Depositions have been taken of the following parties:

Joseph F. Less, Junia E. Raab, Ralph F. Taber, Joseph P. D'Angelo, Benjamin Manasen, Warren J. Hildebrandt, Charles J. McDonough, David L. Sweet, Eugene J. Murphy, Charles H. Till, Vice President of Marine Midland Bank - Western, and Noel E. Bartlo.

All of the above depositions will be used at trial if necessary.

HEFFERNAN, SWEET & MURPHY
1202 Marine Trust Building
Buffalo, New York 14203
(716) 854-5960

and

LOUIS LOSS
Landgell Hall
Cambridge, Massachusetts 02138
(617) 495-4626

Attorneys for the Plaintiffs
Joseph F. Less and Junia E. Raab

UNITED STATES DISTRICT COURT: WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION, a
New York corporation
RALPH F. TABER
JOSEPH P. D'ANGELO, also known as
Frank Weber
BENJAMIN MANASEN
ERVIN HIMMELFARB and
WARREN J. HILDEBRANDT

Civil Action No. 1967-182

Defendants

JUNIA E. RAAB

Civil Action No. 1967-190

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION, a
New York corporation
RALPH F. TABER
JOSEPH P. D'ANGELO, also known as
Frank Weber
BENJAMIN MANASEN and
WARREN J. HILDEBRANDT

Defendants

PRE-TRIAL STATEMENT OF DEFENDANTS TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT

FACTS

The background facts of the action are set forth in great detail in the pretrial statement of the plaintiff and of the defendant D'Angelo. While we do not necessarily concur in all of said statements of alleged facts, most of such statements are correct.

POSITION OF DEFENDANTS, TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN & WARREN J. HILDEBRANDT

Our position is set forth in detail in the second separate affirmative defense set up in our answer (Par. 8 thru 44, Answer of TABER INSTRUMENT CORPORATION et al).

On August 30, 1965, TABER INSTRUMENT CORPORATION instituted an action in Supreme Court, Erie County, against the plaintiff JOSEPH F. LESS and others, for a permanent injunction, enjoining and restraining those defendants from manufacturing, distributing or selling pressure transducers, and from the further use of TABER INSTRUMENT CORPORATION trade secrets, designs, improvements, engineering skills, confidential knowledge and information relative to the development, manufacture, distribution and sale of pressure transducers, acquired during their employment by TABER INSTRUMENT CORPORATION. The complaint in that action also demanded substantial money damages, as well as other injunctive relief.

The defendants in that action interposed answers denying the material allegations of the complaint.

The plaintiff JOSEPH F. LESS, as well as DONALD J. LESS and STANLEY LESS, on October 14, 1965, began actions in Supreme Court, Erie County against TABER INSTRUMENT CORPORATION, RALPH F. TABER and WARREN J. HILDEBRANDT, individually and as

Trustees of the Board, demanding, in each case, declaratory judgment that they were entitled to substantial sums of money as benefits under the TABER INSTRUMENT CORPORATION Profit Sharing Retirement Plan.

All of the named defendants in those three actions appeared therein and interposed an answer, denying the material allegations of each plaintiff's complaint, and setting up in each action an affirmative defense, alleging breach of a condition precedent, express or implied, to render "loyal faithful service by the Participants" in said Profit Sharing Retirement Plan.

Thereafter, and while all four actions were pending in Supreme Court, Erie County, the parties and their attorneys entered into extensive negotiations for the compromise settlement and discontinuance of all said actions, which included, as an integral part thereof, negotiations for the purchase of the plaintiff JOSEPH F. LESS' 14,100 shares of stock in TABER INSTRUMENT CORPORATION.

On April 13, 1966, an agreement of settlement and compromise was reached between the plaintiff JOSEPH F. LESS and the defendants TABER INSTRUMENT CORPORATION, RALPH F. TABER, and WARREN J. HILDEBRANDT, whereby all parties agreed to discontinue their respective actions in Supreme Court, Erie County., exchange mutual releases; TABER INSTRUMENT CORPORATION agreed to buy Less' 14,100 shares of TABER INSTRUMENT CORPORATION stock for $10.00 per share, a total purchase price of $141,000; and the claims of the three plaintiffs JOSEPH F. LESS, DONALD J. LESS and DONALD E. JOSLYN against the Pension Plan and Retirement Fund were paid.

The purchase of JOSEPH F. LESS' stock was, therefore, an integral part of an arms length settlement and compromise, which is a complete defense to this action.

EXHIBITS

The Exhibits marked for identification at the depositions are so numerous, that we are unable to state at the present time which of said Exhibits we will offer in evidence.

POSSIBLE WITNESSES

RALPH F. TABER, BENJAMIN MANASEN, WARREN J. HILDEBRANDT JOSEPH P. D'ANGELO, ERVIN HIMMELFARB, DAVID L. SWEET, EUGENE J. MURPHY.

DEPOSITIONS

All of the depositions set forth in plaintiff's pretrial statement or portions thereof, will be used as necessary.

Dated:
February 8, 1973

McDONOUGH BOASBERG & McDONOUGH,
Attorneys for Defendants, Taber Instrument
Corporation, Ralph F. Taber, Benjamin
Manasen and Warren J. Hildebrandt
Office and P. O. Address
930 Walbridge Building
Buffalo, New York 14202

Notice of pretrial conference on March 13, 1973.

United States District Court

FOR THE

Western District Of New York

Joseph F. Less

v.

Taber Instrument Corp, et al

Junia E. Raab

vs.

Taber Instrument Co. et al

No. Civ-1967-182
Civ-1967-190

TAKE NOTICE that the above-entitled case has been set for Pre-Trial Conference at Buffalo, N.Y. , on March 13 , 19 73 , at 9:30 A.M.

Part 2, Hon. John T. Curtin.

Date March 1 , 19 73

JOHN K. ADAMS
Clerk.

By Robert J. White
Deputy Clerk.

To Heffernan, Sweel & Murphy
1202 Marine Trust Bldg.
Buffalo, N.Y.

Charles J. McDonough, Esq.
930 Walbridge Bldg.
Buffalo, N.Y.

Robert Hitchcock, Esq.
Marine Trust Bldg.
Buffalo, N.Y.

Harold Boreanaz, Esq.
736 Brisbane Bldg.
Buffalo, N.Y.

Louis Loss, Esq.
Langdell Hall
Cambridge, Mass

Hodgson, Russ, Andrews, Woods & Goodyear
1800 One M & T Plaza
Buffalo, N.Y.

Notice of status report on February 7, 1974.

United States District Court
FOR THE
WESTERN DISTRICT OF NEW YORK

Junia E. Raab

v.

Taber Instrument Co. et al

No. Civ-1967-190

TAKE NOTICE that the above-entitled case has been set for Status Report at Buffalo, N.Y. , on February 7, , 1974 , at 10:00 A.M. Part 2, Hon. John T. Curtin.

Date January 14 , 1974

JOHN K. ADAMS,
Clerk.

By Robert J. White,
Deputy Clerk.

To James P. Heffernan, Esq.
Charles J. McDonough, Esq.
Phillips, Lytle, Hitchcock, Blaine & Huber

Notice of Motion by Plaintiffs Joseph F. Less and Junia E. Raab for Consolidation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB and
WARREN J. HILDEBRANDT,
Defendants.

Civil Action No.
1967-182

JUNIA E. RAAB,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN and
WARREN J. HILDEBRANDT,
Defendants.

NOTICE
OF
MOTION
FOR
CONSOLIDATION

Civil Action No.
1967-190

PLEASE TAKE NOTICE that upon the annexed affidavit of David L. Sweet and upon all the pleadings filed herein and proceedings heretofore had, the undersigned will move this Court at the United States Courthouse, Buffalo, New York, on the 21st day of February, 1974, at 10:00 A. M., or as soon thereafter as counsel can be heard, for an order that the above-entitled actions be consolidated or tried together on the ground that they involve common questions of law and fact and that consolidation will thus avoid expense and delay.

Dated: February 14, 1974

HEFFERNAN, SWEET & MURPHY
1202 Marine Trust Building
Buffalo, New York 14203
(716) 854-5960
and
LOUIS LOSS
Langdell Hall
Cambridge, Massachusetts 02138
(617) 495-4626

Attorneys for the Plaintiffs

TO: CINDY R. TABER
33 Park Lane Court
Williamsville, New York 14221

MARINE MIDLAND BANK - WESTERN
One Marine Midland Center
Buffalo, New York 14203

McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for the Defendants,
TABER INSTRUMENT CORPORATION
RALPH F. TABER,
BENJAMIN MANASEN and
WARREN J. HILDEBRANDT
930 Walbridge Building
Buffalo, New York 14202

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for the Defendant,
JOSEPH P. D'ANGELO
3400 Marine Midland Center
Buffalo, New York 14203

HAROLD J. BOREANAZ, ESQ.
Attorney for the Defendant,
ERVIN HIMMELFARB
736 Brisbane Building
Buffalo, New York 14203

Notice of Motion by Plaintiffs Joseph F. Less and Junia E. Raab for Consolidation.

STATE OF NEW YORK)
) SS: AFFIDAVIT
COUNTY OF ERIE)

DAVID L. SWEET, being duly sworn, deposes and says:

1. I am an attorney at law and member of the firm of Heffernan, Sweet & Murphy, attorneys for the plaintiffs herein, and am familiar with the proceedings heretofore had in these actions.

2. The plaintiffs in these actions are both former shareholders of Taber Instrument Corporation (TIC) whose shares of TIC were purchased by that corporation in the spring of 1966. TIC bought 14,100 shares of its stock from the plaintiff Less on May 4, 1966, at a price of $10.00 per share; it bought 600 shares of its stock from the plaintiff Raab about a month later, on June 3, 1966, at the price of $8.00 per share. Both actions arise under the Securities and Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission and are based upon the failure of the defendants to disclose to the plaintiffs or their representatives that at the time of the purchase of their shares, negotiations were being carried on for the acquisition of TIC by Teledyne, Inc., at a price greatly in excess of the prices paid the plaintiffs for their TIC shares. The plaintiffs claims that had they been informed of those negotiations they would not have sold their shares for the prices they received.

3. Each of the plaintiffs was, at the time of the purchase of his shares, a former officer and director of TIC

and each was involved in litigation in New York State Supreme Court with TIC and the Trustees of its Profit Sharing Plan, seeking recovery of moneys due him as a former employee under that Plan.

4. In each case, the final negotiations for the purchase of the stock by TIC were carried on by its attorney, Charles J. McDonough, who conducted these negotiations with deponent, as to the Less stock, and with attorney Franklin Ness, as to the Raab stock.

5. In each case, the purchase of the stock by TIC was accompanied by payment to the plaintiff of the amount that he was claiming in the New York action against TIC and the Trustees of its Profit Sharing Plan. The purchase of Less' stock was also accompanied by the exchange of mutual releases and stipulations of discontinuance regarding certain other litigation in State Supreme Court brought by TIC against the plaintiff Joseph F. Less, his son, Donald Less, and brother, Stanley Less, and others (matters unrelated to the stock purchase), and by the payment by the Trustees of the Profit Sharing Plan to said Donald Less and Stanley Less of moneys that they, as former employees of TIC, had claimed from the said Profit Sharing Plan.

6. In the two instant actions, the answers of the defendants contain denials and affirmative defenses, which are, for the most part, virtually identical.

7. Discovery has disclosed that the 14,100 shares purchased by TIC from the plaintiff Less were almost immediately redistributed to other insiders who had knowledge of the Teledyne

acquisition negotiations, namely the defendants D'Angelo and Himmelfarb. The 600 shares purchased by TIC from the plaintiff Raab were, upon information and belief, retired by TIC.

8. Extensive pretrial discovery has disclosed that the defendants concealed from both plaintiffs the fact that representatives of TIC had been conducting negotiations with representatives of Teledyne, Inc., since early February, 1966; that by April 1, 1966, Teledyne had indicated that it would pay $2.5 Million for TIC, which amounted to a price far in excess of the prices paid to the plaintiffs for their shares; that by May 1, 1966, a price of $3.8 Million was being discussed between Teledyne and TIC; that a comprehensive draft agreement for acquisition of TIC by Teledyne for $3.8 Million was sent to a representative of TIC on or about May 6, 1966, and that following further negotiations, an agreement for the acquisition for the $3.8 Million price was executed on July 27, 1966, following authorization by the Board of Directors of TIC on that date; that when Teledyne learned about the aforesaid dealings between TIC and its shareholders Less and Raab, it demanded an indemnification agreement and a pledge of stock as protection against liability to both Less and Raab; that following further negotiations, a supplemental agreement between TIC and Teledyne was entered into amending the July 27, 1966, agreement in certain respects, including amending the pledge agreement by eliminating reference to Raab's 600 shares and limiting the indemnity to liability to Less arising out of the purchase of his 14,100 shares; that the acquisition of TIC by Teledyne for

45,000 Teledyne shares was consummated on December 30, 1966, in accordance with said agreements; that as called for by the aforesaid agreements, the defendants Ralph F. Taber, Ervin Himmelfarb and Joseph D'Angelo each pledged 1,175 shares of Teledyne stock with an escrow agent to be applied against any liability to Less with respect to the purchase of his 14,100 shares of TIC and their resale to Himmelfarb and D'Angelo.

9. It also appears from pretrial examination of the witnesses and documents that actual delivery to TIC shareholders of their Teledyne shares was made on or about May 16, 1967, at which time Teledyne shares were trading on the New York Stock Exchange at upwards of $180.00 per share; that the plaintiff Less, on liquidation of TIC, would have received approximately 8,000 Teledyne shares and the plaintiff Raab approximately 350 Teledyne shares.

10. Both plaintiffs will offer proof at the trial that they would have sold their Teledyne shares in 1967.

11. Both plaintiffs brought timely suits for rescission of the purchases of their TIC stock, tendered restitution of all that they received under the purchase contracts, and asked that they receive on liquidation of TIC their portion of the 45,000 Teledyne shares of the monetary equivalent of that portion.

12. Both cases involve the application of Rule 10b-5 of the S.E.C. making it unlawful by the use of any means or instrumentality of interstate commerce or the mails to make any untrue statement of material fact or to omit to state a material fact in connection with the purchase or sale of any security.

The effect of Section 29b of the Securities and Exchange Act is to render void any contract made in violation of said Rule 10b-5 as regards the rights of any person having violated the rule with respect to such contract.

13. In both of these actions, the defendants have raised as affirmative defenses matters which may be relevant to the question of the nature and amount of the consideration given the plaintiffs for their stock, but which are not relevant to the issue of whether the plaintiffs are entitled to recover by reason of the nondisclosure of the Teledyne negotiations. As to Less, these matters include recitations as to the former state court litigation involving allegations of wrongdoing by Less and others with regard to TIC's trade secrets, misappropriation of property, references to the suits for profit sharing moneys, and allegations that those various actions were settled and moneys paid as a part of the stock purchase transaction. As to Raab also, the defendants have interposed similar allegations and defenses.

14. In view of the important issues of fact and law common to both of these cases and to avoid costly and time-consuming duplication of litigation, these cases should be consolidated for trial.

WHEREFORE, deponent prays for an order that the above-entitled actions be consolidated or tried together, on the ground that they involve common questions of law and fact and that consolidation will thus avoid expense and delay.

Subscribed and sworn to before
me this 14th day of February,
1974.

DAVID L. SWEET

Commissioner of Deeds
In and for City of Buffalo
My Commission Expires 12/31/74

Notice of Motion by Plaintiffs Joseph F. Less and Junia E. Raab for Consolidation.

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

DAVID L. SWEET, being duly sworn, deposes and says:

1. That he is not a party to the within actions, is over eighteen (18) years of age and resides at 5011 Pine Ledge Drive, Clarence, New York.

2. That on the 14th day of February, 1974, deponent served the within notice of motion for consolidation upon HAROLD J. BOREANAZ, attorney for the defendant ERVIN HIMMELFARB, by delivering a true copy thereof to Mr. JOHN J. HEFFRON at Mr. BOREANAZ's office at 736 Brisbane Building, Buffalo, New York, in Mr. BOREANAZ's absence.

3. That on the 14th day of February, 1974, deponent served the within notice of motion for consolidation upon McDONOUGH, BOASBERG, McDONOUGH & BELTZ, attorneys for certain of the defendants herein, at their offices at 930 Walbridge Building, Buffalo, New York, by delivering a true copy thereof personally to RICHARD F. McDONOUGH, a partner in said firm.

Subscribed and sworn to before me
this day of February, 1974.

Notice of Motion by Plaintiffs Joseph F. Less and Junia E. Raab for Consolidation.

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

GERALDINE A. SHARRY, being duly sworn, deposes and says:

1. That she is not a party to the within actions, is over eighteen (18) years of age and resides at 111 Edson Street, West Seneca, New York.

2. That on the 14th day of February, 1974, deponent served the within notice of motion for consolidation on the within named MARINE MIDLAND BANK - WESTERN at 2800 Marine Midland Center, Buffalo, New York, by delivering personally to and leaving with JOSEPH F. MEIER, JR., its Vice President, Trust Department, a true copy thereof.

3. That on the 14th day of February, 1974, deponent served the within notice of motion for consolidation upon PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, attorneys for the defendant JOSEPH P. D'ANGELO herein, by delivering personally a true copy thereof to Mr. EDWARD M. GRIFFITH, JR., a partner, at their offices at 3400 Marine Midland Center, Buffalo, New York.

Geraldine A. Sharry

Subscribed and sworn to before me
this 19th day of February, 1974.

James D. Hoffman

Affidavit of Charles McDonough in Opposition to motion to consolidate.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff,

-vs-

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB and
WARREN J. HILDEBRANDT,

Civil Action No.
1967-182

Defendants.

JUNIA E. RAAB,

Plaintiff,

-vs-

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN and
WARREN J. HILDEBRANDT,

Civil Action No.
1967-190

Defendants.

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

CHARLES J. McDONOUGH being duly sworn deposes and says that he is the attorney for the defendants TABER INSTRUMENT CORP., BENJAMIN MANASEN and WARREN J. HILDEBRANDT herein, and is personally familiar with all matters and things herein alleged. This affidavit is submitted in opposition to the motion of the plaintiffs LESS and RAAB to consolidate the two actions for trial.

Affidavit of Charles McDonough in Opposition to motion to consolidate.

Federal Rule 42 permits the court to consolidate or join for trial "actions involving a common question of law or fact".

While the legal questions involved in the two actions are similar, the actions do not involve common questions of fact. As clearly indicated in the moving affidavit of counsel for the plaintiffs, the respective purchases of the plaintiff Less's 14,100 shares of Taber Instrument Corporation stock and the plaintiff Raab's 600 shares were entirely separate and distinct transactions. The only similarity with respect to the facts of each case is that in each case the purchase of the plaintiff's stock was part of a settlement between the parties which in each instance involved payment to each plaintiff of his claim for retirement benefits under the Taber Instrument Corporation's Profit Sharing Retirement Plan, which claims the trustees of the plan had theretofore resisted on the ground of disloyalty of the respective plaintiffs.

The court will also note that Ervin Himmelfarb had nothing to do with the purchase of the plaintiff Raab's stock, and is not a named defendant in that case. Upon information and belief, it would be particularly unfair to the defendant Himmelfarb to compell him to defend the Less action at a trial wherein the allegations and testimony of the plaintiff Raab will necessarily have a prejudicial affect upon all of the defendants in both cases.

Affidavit of Charles McDonough in Opposition to motion to consolidate.

This motion under Rule 42 is addressed to the discretion of the court. Deponent respectfully submits that to grant the motion for consolidation or joint trial will not only unduly lengthen the trial of the Less action, but must necessarily confuse the issues in the respective cases. This will be prejudicial not only to the defendant Himmelfarb, but also particularly to the defendants Benjamin Manasen and Warren J. Hildebrandt, whom deponent represents, and who are involved in the litigation only because they were directors and/or officers of Taber Instrument Corporation at the time of the respective purchases of the Less shares and the Raab shares by Taber Instrument Corporation.

No claim is made in either action that either the defendant Benjamin Manasen or the defendant Warren J. Hildebrandt profited personally by either corporate purchase of stock.

Deponent therefore respectfully submits that in the proper exercise of the court's discretion, the plaintiff's motion for consolidation or joint trial should be denied.

Charles J McDonough

Sworn to the 18th day
of February, 1974.

Richard N Kirchgraber

RICHARD N. KIRCHGRABER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1975

Notice of Substitution of Falk, Siemer, Glick, Tuppen and Maloney as Attorneys for Estate of Ralph F. Taber.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff,
v.
TABER INSTRUMENT CORP.,
RALPH F. TABER,
JOSEPH P. D'ANGELO,
BENJAMIN MANASEN and
WARREN J. HILDEBRANDT,
Defendants.

Civil No. 1967-190

NOTICE

SIRS:

PLEASE TAKE NOTICE, that the attorney of record for Ralph F. Taber, the defendant in the above entitled action, and his successor in interest, the Estate of Ralph F. Taber, has been changed, and that Falk, Siemer, Glick, Tuppen & Maloney, with offices located at 2200 Main Place, Buffalo, New York, has been substituted as attorney for Ralph F. Taber, the defendant, by consent filed with the clerk of the court on the 18th day of March, 1974, and that Edward D. Siemer, Esq. hereby appears for the said defendant and demands that all papers in this action be served upon him at his said office.

Dated: March 8, 1974.

Edward D. Siemer

Edward D. Siemer,
Attorney for Defendant,
Estate of Ralph F. Taber
2200 Main Place
Buffalo, New York
852-6670

TO: David Sweet, Esq.
Heffernan, Sweet & Murphy
1202 Marine Trust Building
Buffalo, New York 14203

Robert M. Hitchcock, Esq.
Phillips, Lytle, Hitchcock, Blaine & Huber
1330 Marine Trust Building
Buffalo, New York 14203

Harold J. Boreanaz, Esq.
Boreanaz, O'Shea & NeMoyer
736 Brisbane Building
Buffalo, New York 14203

Charles J. McDonough, Esq.
McDonough, Boasberg, McDonough & Beltz
930 Walbridge Building
Buffalo, New York 14202

Notice of Substitution of Falk, Siemer, Glick, Tuppen and Maloney as Attorneys for Estate of Ralph F. Taber.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff,

v.

TABER INSTRUMENT CORP.,
RALPH F. TABER,
JOSEPH P. D'ANGELO,
BENJAMIN MANASEN and
WARREN J. HILDEBRANDT,
Defendants.

Civil No. 1967-190

CONSENT TO CHANGE
OF ATTORNEY

We, the undersigned, do hereby consent and agree that the attorney of record for defendant Ralph F. Taber, and his successor in interest, the Estate of Ralph F. Taber, be changed and that Falk, Siemer, Glick, Tuppen & Maloney, 2200 Main Place, Buffalo, New York, be substituted as attorney for the Estate of Ralph F.Taber, a defendant herein, in the place and stead of McDonough, Boasberg, McDonough & Beltz, 930 Walbridge Building, Buffalo, New York.

Dated: March , 1974.

Charles J. McDonough, Esq.
McDonough, Boasberg, McDonough & Beltz
Retiring Attorney for Defendant

L D Sheldon

L. D. Sheldon,
Trust Officer
Marine Midland Bank-Western
Executor for Estate of Ralph F. Taber

Edward D Siemer

Edward D. Siemer, Esq.
Falk, Siemer, Glick, Tuppen & Maloney
Substituted Attorney for Defendant

Notice of Substitution of Falk, Siemer, Glick, Tuppen and Maloney as Attorneys for Estate of Ralph F. Taber.

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

On this 11 day of March, 1974, before me personally appeared L. D. Sheldon, to me known, and known by me to be the same person who executed the Consent to Change of Attorney and acknowledged to me that he executed the same.

John D. Drullard

JOHN D. DRULLARD
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1975

Notice of Substitution of Falk, Siemer, Glick, Tuppen and Maloney as Attorneys for Estate of Ralph F. Taber.

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 1974, copies of the foregoing Consent to Change of Attorney and Notice were mailed postage prepaid to:

David Sweet
Heffernan, Sweet & Murphy
1202 Marine Trust Building
Buffalo, New York 14203

Robert M. Hitchcock
Phillips, Lytle, Hitchcock, Blaine & Huber
1330 Marine Trust Building
Buffalo, New York 14203

Harold J. Boreanaz
Boreanaz, O'Shea & NeMoyer
736 Brisbane Building
Buffalo, New York 14203

Charles J. McDonough
McDonough, Boasberg, McDonough & Beltz
930 Walbridge Building
Buffalo, New York 14202

Deanne C. Siemer

Deanne C. Siemer
2200 Main Place
Buffalo, New York
852-6670

Letter from Sweet withdrawing motion for consolidation.

HEFFERNAN, SWEET & MURPHY
ATTORNEYS AT LAW
1202 MARINE TRUST BLDG.
BUFFALO, N.Y. 14203

JAMES P. HEFFERNAN
DAVID L. SWEET
EUGENE J. MURPHY
[redacted]

TELEPHONE 854-5960
AREA CODE 716

March 20, 1974

Hon. John T. Curtin
United States District Judge
United States Courthouse
64 Court Street
Buffalo, New York 14202

Re: Leas vs. Taber Instrument Corporation, et al
Civil Action No. 1967-182
Raab vs. Taber Instrument Corporation, et al
Civil Action No. 1967-190

Dear Judge Curtin:

The purpose of this letter is to report on the current status of the above actions and developments that have taken place since the status conference of February 7, 1974.

As you will recall, the conference on February 7, 1974, was attended by Arthur M. Sherwood of Mr. Hitchcock's office, Charles J. McDonough and ourselves. We informed you that we had been waiting for some time for word as to whether Mr. McDonough was to be replaced as trial counsel in these cases by Edward D. Siemer, and Mr. McDonough then announced that it had been decided that Mr. Siemer would replace him as counsel for the Estate of Ralph F. Taber but that Mr. McDonough intended to remain in the case as trial counsel for the defendants Taber Instrument Corporation, Manasen and Hildebrandt.

The question of possible consolidation of the two actions was then discussed and Mr. McDonough voiced his objection. You informed us that Harold Boreanaz, representing the defendant Himmelfarb in the Raab case, was engaged elsewhere but had left word with you that he would oppose consolidation.

BEST COPY AVAILABLE

You then scheduled a further conference at 9:30 A. M. on February 22, 1974, stipulating that all counsel, including Mr. Siemer, were to be present. We were later informed by the Clerk of the Court that that conference had been canceled because of the death of Judge Henderson and that a new date would be set by the Court. As yet, that date has not been set.

On February 14, 1974, we served formal notice of motion for consolidation, returnable February 21, 1974, upon counsel of record, and upon Marine Midland Bank - Western as Co-Executor of the Estate of Ralph F. Taber, since no notice of substitution of Mr. Siemer had been received, and we also delivered a copy to Mr. Siemer. Mr. Siemer's firm thereafter served a notice of substitution in the Less case, and at their request, the motion was adjourned to February 28, 1974, and again to March 18, 1974, so that they could prepare. In the meantime, we loaned them pleadings and other documents in both cases as they requested.

By last Friday, March 15, 1974, we had received no answering affidavits from anyone and were unable to reach any of the opposing counsel, except for Mr. Hitchcock, to learn when their papers would be received and whether they intended to proceed with the motion on the 18th. The motion was therefore adjourned to March 25, 1974.

We have received today notice of substitution of Mr. Siemer's firm as attorneys for the Estate of Ralph F. Taber in the Raab case.

We are well aware that these cases are overdue for trial and wish to avoid any further preliminary skirmishes, such as litigation over the question of consolidation, which will further delay getting them set down for trial. We have, therefore, reviewed this question and frankly feel that it is not worth pursuing, in view of all of the circumstances. We recognize that the joining of the two cases for trial might produce additional and unnecessary

Letter from Sweet withdrawing motion for consolidation.

complications in what are already sufficiently complex matters. In addition, we have now satisfied ourselves that the law will permit us to use in the Raab action, if necessary, the extensive pretrial depositions taken in the Less action, without consolidation or joint trial. Also, as opposing counsel have indicated during pretrial discussions held before Magistrate Maxwell, it appears likely that once the Less case has been resolved the Raab case can be settled rather readily.

Accordingly and for the above reasons, we now hereby withdraw our motion for consolidation, and ask that the Less case proceed to trial, with the Raab case to be tried at a later date.

We would like to turn to the matter of trial counsel. As the Court knows, Mr. McDonough will take the witness stand on various important and sensitive areas of the case, as will the undersigned and my partner, Mr. Murphy. It therefore appears that it would be improper under the canons of ethics for Mr. McDonough or any member of his firm, or for any member of our firm, to act as trial counsel in these cases. The Court indicated its own concern over this question at a pretrial conference. Despite the substitution of Mr. Siemer as counsel for the Estate of Ralph F. Teber, Mr. McDonough apparently intends to remain as trial counsel for other defendants. We feel that he should be disqualified and we hereby put on record our objection to his remaining as trial counsel. In accordance with the requirements of the canons of ethics on this question, we have arranged for outside trial counsel and feel that Mr. McDonough and/or his clients should do likewise. We respectfully request that the Court convene another meeting to resolve this question and to consider the fixing of a trial date in the Less case.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By: David Sweet

DLS:gs

CC: All Counsel of Record
BCC: David E. Montgomery, Esq.

Memorandum of points and authorities of defendant (Est. of Ralph E. Taber) in opposition to motion to consolidate.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
RALPH F. TABER,
JOSEPH P. D'ANGELO,
BENJAMIN MANASEN,
ERVIN HIMMELFARB, and
WARREN J. HILDEBRANDT,
Defendants.

CIV. NO. 1967-182

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT ESTATE OF RALPH F. TABER IN OPPOSITION TO MOTION TO CONSOLIDATE

Falk, Siemer, Glick, Tuppen & Maloney
2200 ERIE COUNTY SAVINGS BANK BUILDING
BUFFALO, NEW YORK 14202
AREA CODE 716 852-6670

Memorandum of points and authorities of defendant (Est. of Ralph E. Taber) in opposition to motion to consolidate.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,
vs.

TABER INSTRUMENT CORPORATION,
RALPH F. TABER,
JOSEPH P. D'ANGELO,
BENJAMIN MANASEN,
ERVIN HIMMELFARB, and
WARREN J. HILDEBRANDT,
Defendants.

CIV. NO. 1967-182

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT ESTATE OF RALPH F. TABER IN OPPOSITION TO MOTION TO CONSOLIDATE

This is an action for rescission of a contract that is brought under Sections 10(b) and 29(b) of the Securities Exchange Act of 1934. 15 U.S.C. §§78j(b), 78cc(b). Plaintiff in this action seeks to consolidate it with an action entitled Raab v. Taber Instrument Corp., Civ. No. 1967-190, (hereinafter the "Raab action") also pending in this court.

Memorandum of points and authorities of defendant (Est. of Ralph E. Taber) in opposition to motion to consolidate.

Defendant, Estate of Ralph F. Taber* (hereinafter "Taber"), opposes plaintiff's motion on the grounds that: (1) there are no common questions of fact or law as required by Rule 42(a), Federal Rules of Civil Procedure; (2) these are actions to be tried before a jury and the consolidation would cause unnecessary complexity and confusion of the issues; (3) consolidation of these two actions would greatly prejudice defendant Taber and make impossible a fair and impartial trial with respect to either action; and (4) the plaintiff has not sustained his burden of proof that consolidation would result in greater convenience or economy of effort for the court or the parties.

STATEMENT OF FACT

The Less action and the Raab action grew out of two entirely distinct factual settings. As will appear from the description set out below, the only common aspects of these two cases are that both actions are brought under the same provisions of federal statute and both actions involve the sale of shares of stock in Taber Instrument Corporation. These common aspects are far outweighed by the dissimilar aspects of the two actions as readily appears from the pleadings and the extensive discovery already conducted in these actions.

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*Ralph F. Taber was a named defendant in the complaint filed on May 8, 1967. Taber died on or about February 16, 1973, and on July 3, 1973 letters testamentary were issued by the Surrogate's Court of the County of Erie to Cindy R. Taber and Marine Midland Bank as Executors. Thereafter, on September 11, 1973, on motion of plaintiff, this court entered an order substituting Cindy R. Taber and the Marine Midland Bank as defendants. The references to "Taber" and "Estate of Ralph F. Taber" herein are to these Executors as party defendants. On February 21, 1974, by consent, the firm of Falk, Siemer, Glick, Tuppen & Maloney was substituted as counsel for the Estate of Ralph F. Taber.

The Less Action

Joseph Less, the plaintiff in this action, (hereinafter "Less") became acquainted with Taber in the late 1930's, and has alleged that he participated in 1941 when Taber Instrument Corporation (hereinafter "TIC") was formed. (Complaint, ¶2). Less testified that he and Taber had been good friends for 36 years (T.762)* and Less was Vice President in charge of manufacturing at TIC from 1942 until he was discharged in January, 1965. (T.639). The Comptroller of TIC testified that, beginning in 1956 and at various times thereafter, Less received shares of TIC stock. (T.273-75). By 1965, Less testified that he had accumulated 14,100 shares of TIC stock. (T.598-99).

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*References "T." are to pages in the transcripts of depositions in the Less action taken at various times between July 31, 1967 and October 1, 1970. Eleven volumes of the transcripts are numbered serially and the remaining five volumes are each numbered independently. The citations herein are only to three of the serially numbered volumes.

Pursuant to a stipulation of counsel, these transcripts have not been filed with the court. Therefore copies of the volumes of transcript containing the pages cited herein have been filed with this Memorandum.

Several of Less' relatives also worked at TIC prior to 1965. Stanley C. Less, who was Joseph Less' brother, was employed by TIC as a toolmaker. (T.632). Donald Less, who was Joseph Less' son, was employed by TIC as a mechanical engineer and Donald Joselyn, who was Joseph Less' son-in-law, was employed by TIC as a salesman. (T.609, 628-29).

Less testified that in 1964 he used TIC materials, equipment and time for his own private engineering projects (T.642-63, 671); and that he removed a lathe and other equipment from TIC for his personal use. (T.686-87, 690-91). Less further testified that by early January, 1965, he and two of his relatives who were or had been employed by TIC had begun a business to produce pressure transducers, the same product produced by TIC. (T.583-85, 627, 700). Taber became aware of these activities in January, 1965, and Less and his relatives were discharged by TIC on January 21, 1965. (T.722, 740, 758-60).

Less testified that in February, 1965 and April, 1965 there were exchanges of letters between TIC and lawyers representing Less with respect to the sale to TIC of the shares of TIC stock held by Less. However no agreement was reached. (T.729-30, 732). On August 2, 1965, Viatran Corporation, the business which Less and his relatives had set up, sold its first pressure transducer.* Shortly thereafter, on August 30, 1965, TIC brought an action against Less, his son, his son-in-law and Viatran Corporation to enjoin Viatran Corporation from producing pressure transducers, for an accounting with respect to any profits, and also for damages in the amount of $250,000 against Less and his relatives involved in the business.**

On a motion for preliminary injunction, Less and his son stated in affidavits*** that Viatran Corporation had no other product than the pressure transducer it was beginning to market and that if enjoined from this manufacturing activity, it would go out of business. On November 17, 1965, an order of King, J. denied the motion for preliminary injunction but required that the case be set down for an early trial.

In October, 1965, Less brought an action against TIC for approximately $59,546 in retirement benefits. At the same time Less' son, Donald Less, brought a similar action for approximately $1,700; and Less' brother, Stanley Less, brought an action for approximately $18,037 in retirement benefits.[*]

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*See Affidavit of D. Less ¶11, sworn to on October 1, 1965 and served in the action entitled Taber Instrument Corp. v. Viatran Corp., unnumbered, Supreme Court, Erie County, filed in this action under cover of a letter from D. Sweet dated January 23, 1969.

**See Complaint, Id.

***Affidavits of Joseph F. Less, ¶9; Donald J. Less, ¶11; Id.

Less testified that he contacted Ralph Taber on at least two occasions after he left TIC with respect to setting a price for the sale of his stock to TIC. (T. 729-33, 768-77). Less testified that on April 1, 1966, he and his lawyers met with a lawyer representing TIC to discuss a settlement of the pending litigation against Less and Viatran Corp. that would include a sale of Less' TIC stock to TIC. (T. 743-45). Shortly thereafter drafts of settlement documents were exchanged, and it is alleged that on May 4, 1966, the settlement was closed. (Complaint, ¶19). TIC paid a total of $193,046 to Less, $1,701 to Less' son, Donald Less, and $16,037 to his brother, Stanley Less. Less delivered 14,100 shares of TIC stock to TIC, releases were exchanged, and stipulations of discontinuance of the four pending actions, a settlement agreement, and certain financing documents were signed by the parties. (Answer of defendants TIC et al., ¶¶37-38).

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[*] See Complaints in actions entitled Joseph F. Less v. Taber Instrument Corp., Donald J. Less v. Taber Instrument Corp., and Stanley C. Less v. Taber Instrument Corp., unnumbered, Supreme Court, Erie County, filed in this action under cover of a letter from D. Sweet dated January 23, 1969.

The Comptroller of TIC testified that after TIC acquired these 14,100 shares from Less, TIC distributed 7,100 of these shares to Irwin Himmelfarb and 7,000 shares to Joseph D'Angelo. (T. 279).

Subsequently, on December 30,1966, Teledyne, Inc. acquired the assets of TIC in consideration of 45,000 shares of Teledyne stock, which, pursuant to a plan of liquidation and dissolution adopted by TIC at about the same time, were to be distributed to the shareholders of TIC in proportion to their stock ownership. (Complaint ¶21)

On May 8, 1967 Less brought this action against TIC, three of its officers and directors, and two other individual defendants, seeking rescission of the sale on May 4, 1966 in order that Less could participate in the distribution of Teledyne shares pursuant to the agreement of December 30, 1966.

The Raab Action

Raab testified that he went to work for TIC in 1952 when his previous employer sold its transducer division to TIC. (R.T. 6)* Raab said that he had been in charge of

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*References "R.T." are to pages in the transcript of the depositions of Junia Raab taken in the Raab action on October 1, 1970.
A copy of this transcript is filed herewith.

the transducer division that was sold to TIC and subsequently became manager of the transducer division at TIC. (R.T. 7). Raab remained in his position as Manager of the Transducer Division until his resignation from TIC in February, 1965. (R.T. 8). It is alleged that by 1965 Raab had received 600 shares of TIC stock from TIC. Complaint ¶8.

Raab's activities at TIC were separate and apart from those of Less. Less did not supervise the pressure transducer activities, (T. 603); and Raab did not supervise anything other than the pressure transducer activities (R.T.8).

Raab testified that on occasion he used his expense account at TIC to take his secretary to dinner, (R.T. 20); cashed in unused plane tickets purchased for him by TIC and used the money to entertain (R.T. 24); made copies of certain drawings in the files of TIC and circulated them outside TIC without Ralph Taber's knowledge (R.T. 26-27); removed a TIC workbench and other materials for his personal use at home (R.T. 30-31); used the expense account of a TIC manufacturer's representative to pay the expenses of a trip to Las Vegas for his secretary (R.T. 41); hired two of his relatives to work at TIC (R.T. 44); and after resigning from TIC, removed from TIC premises a brief case filled with materials belonging to TIC. (R.T. 62-63).

Raab resigned from TIC on February 18, 1965 (R.T. 50), and subsequently made a claim for retirement benefits from TIC. TIC refused to grant retirement benefits to Raab alleging that because of the incidents referred to above and others he did not qualify. (R.T. 48).

On September 2, 1965, Raab brought suit against TIC in Supreme Court, Erie County, demanding judgment for $22,407 in benefits. (R.T. 47). It is alleged that in May, 1966 there were discussions between Raab's attorney and the attorney for TIC looking to a settlement of this litigation; that agreement was reached on the terms of the settlement in May, 1966 and on June 3, 1966, the settlement was closed. (Complaint, ¶12). Under the settlement agreement, TIC paid to Raab a total of $28,354 and Raab delivered to TIC the 600 shares of TIC stock held by him. Releases and stipulations of discontinuance were entered by the parties. See generally R.T. 52-55.

After TIC received Raab's 600 shares, they were retired as Treasury stock and did not share in the Teledyne distribution.

On December 30, 1966, Teledyne, Inc. acquired the assets of TIC in consideration of 45,000 shares of Teledyne stock. Because he had previously sold his TIC stock, Raab did not share in the distribution of the Teledyne stock to

TIC shareholders pursuant to a liquidation plan adopted by TIC.

On May 8, 1967, Raab brought this action against TIC, three of its officers and directors, and one other individual defendant, seeking rescission of the sale on June 3, 1966 in order that Raab could participate in the distribution of Teledyne shares.

ARGUMENT OF LAW

Plaintiff in the Less action now seeks to consolidate his action with the Raab action so that both actions would be tried together and the jury would be presented with all facts relevant to either case. As is set out in more detail below, plaintiff's motion should be denied on the grounds that: (1) there are no common questions of fact or law as required by Rule 42(a), Federal Rules of Civil Procedure; (2) these are actions to be tried before a jury and the consolidation would cause unnecessary complexity and confusion of the issues; (3) consolidation of these two actions would greatly prejudice defendant Taber and make impossible a fair and impartial trial with respect to either action; and (4) the plaintiff has not sustained his burden of proof that consolidation would result in greater convenience or economy of effort for the court or the parties.

1. There are no common questions of fact or law as required by Rule 42(a).

The usual situation where consolidation is sought involves several individual actions arising out of a single incident, such as a highway collision or airplane crash. In such cases the facts with respect to the various causes of action will be virtually the same except with respect to damages, therefore consolidation may be appropriate. However, the Less and Raab actions did not arise out of a single incident and the facts with respect to the individual causes of action are substantially different.

Plaintiff apparently bases the motion to consolidate on the similar allegations of the two complaints -- that Less and Raab sold their TIC stock without knowing that TIC had engaged in discussions with Teledyne and that an agreement in principle had been reached on the acquisition of TIC by Teledyne; and that if they had known these facts, they would not have sold at the price they received. Less Complaint ¶¶19-20; Raab Complaint ¶¶13, 14. But similar allegations do not support consolidation; only similar proof of fact. And when the questions of fact are examined, it is evident that they are substantially different in these two cases. For example:

(a) The date of the sale of TIC stock

Less alleges that he sold his stock on May 4, 1966 and must prove that the sale was on that date and not some earlier date.

Raab alleges that he sold his stock on June 3, 1966 and must prove that the sale was on that date and not some earlier date.

There is no allegation that the sales were part of the same transaction or were in any way related.

(b) The state of the negotiations between TIC and Teledyne

Less must prove that the negotiations between TIC and Teledyne had resulted in "an agreement in principle" by May 4, 1966 or some earlier date.

Raab must prove the state of the negotiations as of June 3, 1966 or some earlier date.

In volatile matters such as acquisition negotiations in this industry, these are two distinctly different time frames and the proof will, of necessity, be different.

(c) The disclosure by the buyer or its agents with respect to the TIC-Teledyne negotiations

Less alleges that he (or his representative) was contacted by Messrs. D'Angelo, Bartlo, Hildebrandt, and McDonough and that he, Less, contacted Ralph Taber with respect to setting a price for the sale of Less' stock. Less' representatives during this period were Messrs. Sweet and Murphy. Defendant D'Angelo alleges that on or about April 2, 1966 he informed Less of the TIC-Teledyne negotiations.

Raab alleges that he (or his representative) was contacted by Praker, D'Angelo and McDonough with respect to setting a price for the sale of his stock. Raab's representative during these discussions was Mr. Ness.

There is no allegation that any of the negotiations for the purchase of the Less or Raab stock were joint negotiations or otherwise were in any way related. The defense with respect to Dr. D'Angelo's disclosure applies only to the Less action.

(d) The acquisition of the requisite knowledge by the seller independent of disclosures by the buyer.

Less alleges that he was a founder of TIC and had been employed by TIC since it opened its doors in 1940. Less stated that he had been a good friend of Ralph Taber for 36 years. Less was employed as Vice President in charge of manufacturing at TIC. He was discharged on January 21, 1965 and subsequently initiated at least two contacts with Ralph Taber with respect to the sale of his stock.

Raab alleges that he came to TIC in 1952 and was the Manager of the Transducer Division. He alleges that he resigned from TIC on February 18, 1965. Raab has not testified to any personal contacts with Ralph Taber about the sale of his stock.

Less and Raab occupied different positions at TIC; had different relationships with Ralph Taber; left TIC at different times; and terminated their employment with TIC under different circumstances. Their individual sources of information and possibilities of acquiring the requisite knowledge of the TIC-Teledyne negotiations independent of disclosures by the buyer were substantially different.

(e) The effect on the seller's individual judgment.

Less was faced with a lawsuit by TIC that could have closed down his son's business. This business also employed his son-in-law. There were pending claims on behalf of Less, his son and his brother for retirement benefits from TIC. The sale of Less' stock was a part of the settlement of these four lawsuits.

Raab had brought suit for his own retirement benefits and was faced with a defense by TIC that raised numerous instances of allegedly improper conduct on the part of Raab while he was employed by TIC. Proof of these facts could have affected Raab's current job with another employer. The sale of Raab's stock was a part of the settlement of this lawsuit.

The factors affecting the individual judgment of Less and Raab arise out of totally different factual situations and are in no way related.

(f) The outcome of the sale transaction.

Less' shares were subsequently sold by TIC to Messrs. D'Angelo and Himmelfarb. This apparently caused Less to name Himmelfarb as a defendant.

Raab's shares were retired by TIC and became Treasury stock. Mr. Himmelfarb played no role in the Raab transaction and is not a defendant in the Raab action.

The shares acquired from Less and Raab were treated differently by TIC. The Less shares participated in the Teledyne distribution but the Raab shares did not.

Thus, with respect to each of the principle elements of these actions, there is no common question of fact.

Similarly, there is no common question of law. The plaintiff's theory of liability is based on Rule 10b-5, promulgated under Section 10(b) of the Securities Exchange Act of 1934. That rule provides in pertinent part:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails...(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the circumstances under which they were made, not misleading."

The sanction for violation of Rule 10b-5 is found in Section 29 of the 1934 Act which provides that any contract made in violation of the Act or any rule of the Commission shall be void. The questions raised by the pleadings with respect to the applicability of Rule 10b-5 to the transactions between TIC and Less, and between TIC and Raab are fact questions.* These fact questions are not common to the two transactions within the meaning of Rule 42(a) because they must be determined separately with respect to the circumstances of each transaction.

---

*These fact questions are: (1) whether the transaction was by the use of the mails or other means or instrumentalities of interstate commerce; (2) whether any untrue statements of material fact were made and (3) whether there were any omissions to state a material fact.

The only other questions of law raised by the pleadings are the denial of jurisdiction over the subject matter[*] and person of the defendants.[**] Neither of these can be categorized as common questions of law within the meaning of Rule 42(a).

2. Consolidation would cause unnecessary complexity and confusion of the issues.

Each of the cases sought to be consolidated involves a single sale transaction and the related negotiations that preceded the sale. The Complaint in each of these cases demands a jury trial. If the cases were tried separately, each would proceed expeditiously and there would be no need for lengthy clarifying statements of counsel as to which facts applied to which case. If the cases are consolidated and tried together, there is a substantial chance that the jury will be confused over what persons said what to whom during the negotiations, and what plaintiff or defendant knew what fact at the two different dates of sale. Although the negotiations were conducted entirely separately, and in some substantial part by different persons, there were some instances in which the same persons took part in both negotiations.

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[*] Answer of defendant D'Angelo to Less Complaint, ¶15; Answer of defendant D'Angelo to Raab Complaint, ¶15.

[**] Answer of defendant D'Angelo to Less Complaint, ¶16-17; Answer of defendant Himmelfarb to Less Complaint, ¶9-10; Answer of defendant D'Angelo to Raab Complaint, ¶16-17.

For example, Dr. D'Angelo took part in some aspects of the negotiations with both Less and Raab. Dr. D'Angelo's testimony will be very important with respect to the Less case because his Answer to the Complaint asserts that he informed Less of the negotiations between TIC and Teledyne before Less sold his stock to TIC. However, D'Angelo's role in the Raab negotiations would be confusing since those negotiations were conducted in a different context during 1965. Further, the issue with respect to whether Dr. D'Angelo was an agent of TIC or acting independently arises at different times and under different circumstances in the Less and Raab actions, and if these actions were tried together, this would cause confusion that could only be to the detriment of defendant Taber.

Even if there were questions of fact and law common to these actions, if consolidation would burden the parties and the jury by causing unnecessary complexity and confusion of the issues, a motion for consolidation should be denied. See e.g. St. Paul Fire & Marine Ins. Co. v. King, 45 F.R.D. 519 (W.D. Okla. 1968); Bascom Launder Corp. v. Telecoin Corp., 15 F.R.D. 277 (S.D.N.Y. 1953); Atkinson v. Roth, 297 F. 2d 570 (3d Cir. 1961); Schacht v. Javits, 53 F.R.D. 321 (S.D.N.Y. 1971).

3. Consolidation would cause serious prejudice to defendant Taber.

The Less and Raab actions are based on separate transactions and defendant Taber is entitled to have his liability with respect to each of these transactions determined separately. Yet the mere existence of the Raab claim will seriously affect the jury's ability to make a totally separate determination. If the cases were tried separately, the jury in the Less action would have no knowledge of the Raab transaction as it would not be relevant in any way to the Less transaction. Similarly, the jury in the Raab action would not have before it any aspect of the Less transaction. However if the cases are tried together there is the irresistable influence upon the jury's thinking that not just one, but two transactions were entered into by TIC to re-acquire some of its outstanding stock prior to the sale of TIC's assets to Teledyne. Although the transactions are independent and are not alleged to be connected in any way, it is impossible by instructions to segregate them in the minds of the jury.

Further, the actions brought by Less and Raab are greatly disparate. Less' Complaint demands damages in the amount of $1,400,000 if rescission is unavailable. Raab's Complaint demands damages of only $60,000 if rescission is unavailable. Yet, from the pleadings it appears that the Raab action may have strengths totally lacking in the Less action. For example, the Raab sale took place at a date alleged to be closer to the closing of the sale of TIC's assets to Teledyne and thus closer to the reaching of any "agreement in principle" as is alleged in both complaints. While one of the Answers presents an allegation of disclosure in the Less action no similar positive defense is asserted in the Raab action. By linking a relatively small action with greater strength to a relatively much larger action with much less strength, the positive inferences connected with the small action are inescapably associated with the larger action.

The prejudice to defendant Taber is plain. Consolidation of these two actions would preclude the jury from deliberating effectively and thoroughly on the separate liability of each defendant in these two separate cases. As was held in Bascom Launder Corp. v. Telecoin Corp., 15 F.R.D. 277 (S.D.N.Y. 1953):

> "Although it is highly desirable that judicial effort as well as that of counsel be conserved and the expense of litigation be reduced by the elimination of duplicitous trials, a consolidation of actions may not be granted where it may result in prejudice to one or more of the parties."

See also United States v. Lustig, 16 F.R.D. 378 (S.D.N.Y. 1954); Capstraw v. New York Central R. Co., 15 F.R.D. 267 (N.D.N.Y.1954); cf. Sox v. Hertz Corp., 262 F. Supp. 531 (D.S.C. 1967); State Mutual Life Assurance Co. v. Peat, Marwick, Mitchell & Co., 49 F.R.D. 202 (S.D.N.Y. 1969).

4. There is no indication that consolidation would result in greater convenience or economy of effort for the court or the parties.

The convenience and economy that arise out of consolidation come in large part from avoidance of duplication of testimony that would occur if separate trials were held. In these actions, a comparison of the testimony that would be given in separate and consolidated trials indicates very little, if any, convenience and economy would be achieved by consolidation.

The negotiations that preceded each sale were conducted separately and to some extent by different persons. The sales were made under different circumstances and as a part of the settlement of totally unrelated litigation. The sellers had very different backgrounds, positions and access to information. Each seller left TIC under different circumstances. The date, amount, and effect of each sale was different. TIC even treated the shares acquired as a result of these sales differently.

The only possible overlap in testimony in the two actions is that of Dr. D'Angelo with respect to the development of the TIC-Teledyne negotiations. There were only two other principals in those negotiations -- Ralph Taber, who is deceased, and Charles McDonough who has declined to testify on grounds of lawyer-client privilege. Since Dr. D'Angelo is a defendant and since Mr. McDonough is counsel for several defendants, plaintiffs should not be permitted to urge any inconvenience to them as a basis for this motion.

Plaintiff has the burden of proof with respect to the greater convenience and economy of effort that would result from consolidation. Where this burden has not been sustained, the motion should be denied.

CONCLUSION

For the reasons stated above, defendant Estate of Ralph F. Taber respectfully requests that the motion for consolidation be denied and that this action be tried independently of the action entitled Raab v. Taber Instrument Corp., Civ. No. 1967-196, also pending in this court.

Respectfully submitted,
Deanne C. Siemer
Deanne C. Siemer
2200 Main Place
Buffalo, New York 14202
852-6670

OF COUNSEL:
Falk, Siemer, Glick, Tuppen & Maloney
2200 Main Place
Buffalo, New York 14202

Dated: March 22, 1974.

161

Memorandum of points and authorities of defendant (Est. of Ralph E. Taber) in opposition to motion to consolidate.

CERTIFICATE OF SERVICE

I, Deanne C. Siemer, do certify that on this 22nd day of March, 1974, I caused to be delivered, by hand, a copy of the Memorandum of Points and Authorities of Defendant Estate of Ralph F. Taber in Opposition to Motion to Consolidate, to

David Sweet
Heffernan, Sweet & Murphy
1202 Marine Trust Building
Buffalo, New York 14203

Robert M. Hitchcock
Phillips, Lytle, Hitchcock, Blaine & Huber
1330 Marine Trust Building
Buffalo, New York 14203

Harold J. Boreanaz
Boreanaz, O'Shea & NeMoyer
736 Brisbane Building
Buffalo, New York 14203

Charles J. McDonough
McDonough, Boasberg, McDonough & Beltz
930 Walbridge Building
Buffalo, New York 14202

Deanne C. Siemer
Deanne C. Siemer
2200 Main Place
Buffalo, New York 14202
852-6670

Counsel for defendant
Estate of Ralph F. Taber

Notice of meeting with court on April 29, 1974.

United States District Court
FOR THE
Western District Of New York

Joseph F. Less & Junia E. Raab

v.

Taber Instrument Company, et al

No. Civ-1967-182-190

TAKE NOTICE that the above-entitled case has been set for Meeting with Judge Curtin at Buffalo, N.Y. , on April 29 , 1974 , at 3:00 P.M.

Date March 26 , 1974

JOHN K. ADAMS,
Clerk.

By Robert J White,
Deputy Clerk.

To Robert M. Hitchcock, Esq.
David L. Sweet, Esq.
Charles J. McDonough, Esq.
Edward D. Siemer, Esq.
Harold Boreanaz, Esq.

Letter from Clerk directing McDonough to secure alternate counsel and setting next pretrial meeting for June 3, 1964.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NIAGARA SQUARE
BUFFALO, N. Y. 14202

May 1, 1974

Mr. David L. Sweet, Atty.
1202 Marine Trust Bldg
Buffalo, N.Y. 14203

Mr. Charles J. McDonough, Atty.
930 Walbridge Bldg.
Buffalo, N.Y. 14202

Mr. Robert M. Hitchcock, Atty.
3400 Marine Midland Center
Buffalo, N.Y. 14203

Mr. Ross L. Runfola, Atty.
1360 Statler Hilton Hotel
Buffalo, N.Y. 14202

Mr. Edward D. Siemer, Atty.
2200 Erie County Bank Bldg.
Buffalo, N.Y. 14202

Mr. Harold J. Boreanaz, Atty.
736 Brisbane Bldg.
Buffalo, N.Y. 14203

Re: Civ-1967-182 Joseph F. Less vs Taber Inst Co, et al
Civ-1967-190 Junia E. Raab vs. Taber Inst Co, et al

Gentlemen:

On April 29, 1974, the court held a meeting with the attorneys for the parties in this action. It appears that Charles J. McDonough, attorney for The Taber Instrument Co&Warren J. Hildebrandt,will be an important witness during the trial of this case. For that reason, in the court's opinion, he will not be able to serve as trial counsel. The court directs that he discuss this matter with his clients as soon as possible so that substitute trial counsel may be obtained.

Another attorney in his firm will be substituted for Mr. Robert Hitchcock.

Further proceedings are adjourned until June 3, 1974 at 2:00 P.M. to set a trial date.

Very truly yours,

JOHN K. ADAMS, Clerk

By: Robert J. White
Deputy Clerk

Order That *Less v. Taber Instrument Corp. et al.* Should Proceed First and That *Raab vs. Taber Instrument Corp. et al.* Be Deffered Until After the *Less* Trial.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff

-vs- Civil 1967-182

TABER INSTRUMENT CORP., et al.,

Defendants

JUNIA E. RAAB,

Plaintiff

-vs- Civil 1967-190

TABER INSTRUMENT CORP., et al.,

Defendants

At the June 3, 1974 meeting of attorneys with the court, it was agreed by all counsel that the trial in the case of *Less v. Taber Instrument Corp., et al.*, Civil 1967-182, should proceed first and that the proceedings in the case of *Junia E. Raab v. Taber Instrument Corp., et al.*, Civil 1967-190, be deferred until after the *Less* trial. Mr. McDonough reported to the court that Warren J. Hildebrandt was now represented by attorney Victor T. Fuzak. Mr. Fuzak could not be present at the meeting on the 3rd, but, with the consent of counsel, the court met with Mr. Fuzak on the 4th and he reported to the court that he is retained to represent Mr. Hildebrandt and would be ready for trial in mid-October, 1974.

During the June 3 meeting, Mr. McDonough reviewed the present corporate organisation of Taber Instrument Corporation and expressed his opinion that because of the present state of affairs of the corporation, there were no stockholders or directors able to act to retain an attorney to represent the corporation. It was suggested that the court appoint a trustee to act in behalf of the corporation. The matter was adjourned until June 24, 1974 to permit counsel to submit a plan to the court so that representation for the corporation could be obtained.

Because attorneys Arnold Zelman, Ross Runfola and Victor Fuzak were only recently retained in this case, further leave was given to them to file motions or to take depositions. This work should be done not later than the 24th of June, 1974.

Order That *Less v. Taber Instrument Corp. et al.* Should Proceed First and That *Raab vs. Taber Instrument Corp. et al.* Be Deferred Until After the *Less* Trial.

Plaintiff moved for an early trial date, suggesting September, 1974. After conferring with all counsel, including Mr. Fusak on June 4, it appears to the court that the earliest practical trial date is mid-October. Therefore, the court sets Tuesday, October 15, 1974 as the date for trial. At the June 24 meeting of counsel, the court will determine the pretrial steps necessary so that the October setting can be met. Before June 24 the attorney for the plaintiff shall meet with the Clerk to prepare an exhibit list setting forth all exhibits which [illegible] intends to use at the time of trial.

So ordered.

John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: June 14, 1974

Letter from Clerk setting pretrial meeting for September 24, 1974.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NIAGARA SQUARE
BUFFALO, N. Y. 14202

September 17, 1974

David L. Sweet, Esq.
1202 Marine Trust Bldg.
Buffalo, N.Y.

Deanne C. Siemer
2200 Erie County Savings Bk
Buffalo, N.Y.

Robert M. Hitchcock, Esq.
3400 Marine Midland Center
Buffalo, N.Y.

Arnold M. Zelman, Esq.
1360 Statler Hilton Hotel
Buffalo, N.Y.

Harold J. Boreanaz, Esq.
736 Brisbane Bldg.
Buffalo, N.Y.

Re: Civ-1967-182 Joseph Less vs. Taber Inst Co, et al
Civ-1967-190 Junia E. Raab vs. Taber Inst Co, et al

Dear Miss Siemer & Gentlemen:

Judge Curtin will hold a meeting with the attorneys in the above entitled cases on September 24, 1974 at 9:00 A.M. If there is anyone who cannot attend, please contact the undersigned as soon as possible.

Very truly yours,

JOHN K. ADAMS, Clerk

By: Robert J. White
Deputy Clerk

RECEIVED
SEP 18, 1974
HEFFERNAN, SWEET & MURPHY

Notice of pretrial conference on March 19, 1975.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NIAGARA SQUARE
BUFFALO, N. Y. 14202

February 13, 1975

David L. Sweet, Esq.
1202 Marine Trust Bldg.
Buffalo, N.Y.

Edward D. Seimer, Esq.
2200 Erie County Savings Bk
Buffalo, N.Y.

Robert M. Hitchcock, Esq.
3400 Marine Midland Center
Buffalo, N.Y.

Arnold M. Zelman, Esq.
1360 Statler Hilton Hotel
Buffalo, N.Y.

Harold J. Boreanaz, Esq.
736 Brisbane Bldg.
Buffalo, N.Y.

Re: Civ-1967-190 Junia E. Raab vs. Taber Inst. Co. et al

Gentlemen:

Judge Curtin will hold a pre-trial conference in the above entitled case on March 19, 1975 at 9:30 A.M.

Very truly yours,

JOHN K. ADAMS, Clerk

By: Robert J. White
Deputy Clerk

RECEIVED
FEB 14, 1975
[illegible]

Transcript of Proceedings Held March 19, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

JUNIA E. RAAB,

Plaintiff,

CIVIL DOCKET
NO. 1967-190

-v-

TABER INSTRUMENT CORPORATION, a New York
Corporation; JOSEPH P. D'ANGELO, also known
as FRANK WEBER, BENJAMIN MANASEN, and
WARREN J. HILDEBRANDT

CINDY R. TABER and MARINE MIDLAND BANK-
WESTERN, Executors of Ralph F. Taber,
Deceased,

Defendants.

* *

Proceedings held before the HON. JOHN T. CURTIN, United States District Judge, in Part I, United States Court House, Buffalo, New York, on March 19, 1975.

APPEARANCES:

HEFFERNAN, SWEET & MURPHY, Attorneys for the Plaintiff; DAVID L. SWEET, Esq., of Counsel.

FALK, SIEMER, GLICK, TUPPEN & MALONEY, Attorneys for the Defendant Estate of RALPH F. TABOR; Ms. DEANNA C. SIEMER, of Counsel.

BRENNAN, CALLAHAN, TESSEYMAN, ZELMAN & RUNFOLA, Attorneys for the Defendant BENJAMIN MANASEN; ROSS L. RUNFOLA, Esq., of Counsel.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, Attorneys for the Defendant WARREN J. HILDEBRANDT; VICTOR T. FUZAK, Esq., of Counsel.

Transcript of Proceedings Held March 19, 1975.

THE COURT: In the Raab case, Miss Siemer, Mr. Fuzak, Mr. Runfola, Mr. Sweet, nice to see you all again. Mr. Runfola, you weren't around before.

MR. RUNFOLA: No.

THE COURT: Mr. Zelman was.

MR. RUNFOLA: Arnold Zelman was, your Honor, and I had the unfortunate situation- - -

THE COURT: Does your appearance mean that we are in for trouble?

MR. FUZAK: Where is Mr. Hitchcock.

MR. RUNFOLA: If no money means trouble, your Honor, we are in for trouble.

MS. SIEMER: Mr. Hitchcock is in Florida.

THE COURT: I see. I suppose Mr. Hitchcock is out of this now, right?

MS. SIEMER: I think not, your Honor. He is still committed to the firm to wrap up the D'Angelo matters.

THE COURT: I see.

MR. RUNFOLA: I received a letter from John Adams explaining they have received a letter from the firm.

THE COURT: I see. He sent a copy to everyone and he said his client D'Angelo will not be participating in the pretrial because depositions have been taken of everyone who has or had any knowledge of the Raab sale and there is not a word remotely suggesting that D'Angelo had anything to do with it.

MS. SIEMER: I think that probably fairly characterizes his position.

MR. SWEET: He didn't say he wouldn't come to the trial, did he.

THE COURT: Please?

MR. SWEET: [He didn't go so far as to say he wouldn't come to the trial.

THE COURT: No, he didn't. He didn't say that. I just assumed this was tracked to pretty much the fact picture in the other case or is it different? Of course, we don't have - - -

MR. RUNFOLA: I think pertaining to, may I say, Mr. Manasen there is a difference in fact, your Honor, because Mr. Manasen, or I don't think is claimed and I think is a true statement of fact that none of the stock that emanated from Mr. Raab ever was distributed to Mr. Manasen, so it is a different picture so far as that is concerned.

MS. SIEMER: That's correct, your Honor. This stock was never distributed to anyone.

THE COURT: Certainly we don't have a quorum here. What do you suggest we do in order to get this moving?

MR. SWEET: Your Honor, I had a meeting with Mr. Siemer, Deanne's father and I don't know when it was, a month of two ago, about possibly settling this case and all I can tell you is that we are miles apart on it and I don't see any alternative but to set it down for trial.

THE COURT: So that my thought or my hope that since we settled the other that this one might follow within certain guidelines isn't so.

MR. SWEET: That is what we expected too, your Honor, but it hasn't come to pass.

THE COURT: In the other case the defense had a lot of bad information about the plaintiff there. Is that in this case too?

MS. SIEMER: Yes, your Honor, it is. It is the same kind of a case and the problems that corporation had with this plaintiff are a little bit more directly related to the corporation's business as they related to his expense accounts and travel and certain other expenditures he made on behalf of the company but that is the same issue in this case as there is the same circumstance under which he was discharged and with respect to a settlement it seems to us that it certainly is possible to settle and we have offered to settle with Mr. Sweet based on the same calculation that made in the settlement in the Less case.

The problem here is that the corporation has already paid. According to Mr. Sweet's calculations using the same formula that we used in the Less case of $50 a share, Mr. Raab's holdings were worth $30,000. The corporation has already paid Mr. Raab $23,000 in settlement of this matter and we have the same situation here as we had in Less, the Less case.

There was a settlement of this matter. The coporation paid Mr. Raab a substantial amount and because the amount that the corporation paid Mr. Raab was so close to his claim there isn't a lot of room for difference but we have offered Mr. Sweet the difference.

MR. SWEET: I entirely disagree with what Deanne has just said, but Mr. Raab got $4,800 for his stock and if he had stayed in there the date of closing of the Teledyne deal his stock would have been worth, - under the agreement with Teledyne his stock would have been worth $30,000 and our position is he got $4,800 for his stock and that the profit sharing money that was paid to him out of the profit sharing trust was not from Taber Instrument Corporation but out of a separate trust for the benefit of the employees was entirely unrelated and should not be taken as an offset.

MS. SIEMER: Well, we took it as an offset in the Less case and since Mr. Raab was represented by counsel it is exactly the same situation. He released, - he had a number of claims against the corporation. All of those claims were settled and the stock bought back at the same time. The stock in this case is really a very incidental partof the transaction, unlike Mr. Less who was a major stockholder. Mr. Raab was a very minor stockholder who held only 600 shares of very, - very, - not even a percent of the shares outstanding.

THE COURT: The same general rules apply to him, though, as apply to Mr. Less.

MS. SIEMER: That's correct, and the problem here is the same problem as we had in Less and that is the release was intended to cover all these transactions but the exact wording of the release doesn't and so we are in the same - - -

MR. FUZAK: And there were claims by the corporation against Mr. Raab as well that were settled as I understand it.

MS. SIEMER: That is correct.

MR. SWEET: That is not so. There were no claims by the corporation against Mr. Raab. That is a distinct difference in the two cases. In the Less case you had lawsuits brought by Taber Instrument

Corporation against Mr. Less and his family and a separate count against Mr. Less individually for $50,000, and we heard through all these previous deliberations and discussions that great weight was attached to those lawsuits brought by Taber Instrument Corporation against Mr. Less. We do not have any such case in this Raab situation.

THE COURT: As far as settlement is concerned we also have, although reluctantly, Mr. Hitchcock's client did participate in that other settlement.

MS. SIEMER: That's correct.

MR. SWEET: He didn't contribute any fresh money.

MR. RUNFOLA: Yes, he gave up, I think - - -

MR. FUZAK: Fresh or stale it was money.

MR. SWEET: Well, there was an escrow established against the Less claim and there is no escrow against the Raab claim and part of Mr. D'Angelo's, - Dr. D'Angelo's stock went into that escrow that ultimately was part of the settlement fund.

THE COURT: But you don't have anything now coming from - - -

MR. SWEET: No escrow.

THE COURT: So that would mean a difference in how people participate in the settlement. Mr. Fuzak, you were going to say something?

MR. FUZAK: No. I finished what I was going to say. Thank you.

THE COURT: How long will this take to try?

MS. SIEMER: Well, there is a matter before trial, your Honor, and that is as I have said all along I am not satisfied with the discovery in this case. This was a case that was tagging along with the Less case. Everyone's attention was focused on the Less case. There is very little discovery in this case. It is not adequate with respect to our client. I would expect some additional substantial discovery if this case is going to be trial.

MR. SWEET: We would object to that, your Honor. There is plenty of opportunity for all kinds of discovery. By the time that Miss Siemer's firm got into the case all discovery had been completed and the same, - by the way, there was extensive discovery in the Less case.

THE COURT: Here is the problem the way I look at it. If we go to trial without discovery then what we are going to do is we are going to have a lot of thrashing around and it will take, - who knows, - it certainly will take extra time to try without having discovery. The other thing is this, the present counsel got in the case at a late date, certainly, and also in this case everyone agreed that this case should follow along after the Less case.

We spent a lot of time. You spent a lot of time, everybody else spent a lot of time getting that Less case wrapped up so that I don't think that counsel should be penalized by my order saying, "no more discovery". It is old. I hate to open the file it is so old because the dust begins to pop up but I think that if quickly, expeditiously and reasonably pursued they ought to have discovery so that we can get this decided on the merits.

MR. SWEET: They have had the deposition of Mr. Raab at which Mr. McDonough and all the other counsel conducted that. The other deposition taken in that case was Mr. McDonough's deposition as related directly to that case but all of the discovery pertaining to the Less case insofar as it applied to and covered the transactions between Taber and Taber's representatives and Teledyne, they are extensive and voluminous and it is done and it is in the transcripts.

THE COURT: What do you foresee you need by way of further discovery?

MS. SIEMER: Well, there are two problems, your Honor. One is that one of the parties to the transaction, Mr. Nast who represented Mr. Raab has not been deposed.

THE COURT: In other words, he represented him in the negotiations?

MS. SIMER: That's correct. The other parties are dead. Mr. Taber who didn't testify about the Raab transaction but whose deposition was taken in the Less matter is dead, and of course, Mr. McDonough who testified very briefly about it is also dead. If Mr. Sweet is going to maintain they were entitled to that pension money and that pension money is not a settlement for the stock then I am going to have to go into all of Mr. Raab's peccadillos with respect to the corporation we are going to have to depose Miss Driscoll, we are going to have to depose Mrs. Rose, we are going to have to depose Mr. Halverson, all the people who had dealings with Mr. Raab, who helped him make that corporation money depart for purposes for which it was not authorized.

MR. SWEET: Your Honor, I have to object most strenuously to all this. Mr. McDonough conducted, - who was chief counsel for them and he went into all this stuff. They examined them.

THE COURT: The only reason this business is now on the calendar ~~is~~ is because I sent a notice out. The only way that other case kept going and was finally disposed of is because I sent a notice out.

MR. SWEET: I called up Mr. Walsh and told him that we had this discussion with Mr. Siemer trying to settle it and we hadn't been able to and he said that he would have you send

out the notice. I talked to him. I
tried to get the thing on.

THE COURT: That is fine, but the thing is that I believe that because of all the things I said before, late time of counsel getting in, you know, as far as everybody's attention, and I think from a practical matter it should have been focused on the other case because there we were talking about a million dollars and this case by comparison is certainly a very, very small one so I think that even though late discovery ought to go ahead. When, - how long will it take you to do this?

MS. SIEMER: What I would like to do, your Honor, is to serve Mr. Sweet with some interrogatories. I would like to serve him with some requests for admition because I think we can narrow some of the issues and if that is not satisfactory then I would like to go ahead with the depositions.

MR. SWEET: Could I have something on that, your Honor?

THE COURT: Mr. Sweet.

MR. SWEET: On the stipulations already taken are we going to have a stipulation that those depositions are going to be admissable in this case as if taken in this case?

MS. SIEMER: No.

MR. SWEET: All right. Then we will have to make a motion that they be so treated, your Honor.

THE COURT: All right.

MR. SWEET: Because the obviously pertain to the same issues and it was intended to avoid duplication of asking the same questions all over again of everybody with respect to Raab's case, - they were taken at the same time pretty much and we went into extensive detail on the Teledyne negotiations in Less's depositions.

THE COURT: Make your motion and I will consider it.

MR. SWEET: All right.

THE COURT: The thing is whatever you do should be done right away. What is your timetable?

MS. SIEMER: I have a brief before the Court of Appeals which I have seven days in which to write and I am currently trying a case in the District of Columbia which is on in 14 days. I would like 30 days in which to submit the interrogatories.

THE COURT: I think that is reasonable and I know that when you say "30 days" you mean 30 days. Very well. That is what we will do and then if is this also the requests for admitions?

MS. SIEMER: I will serve the interrogatories. As soon as I get the answers I will serve requests for admitions and as soon as I get the answers to those I can tell you whether or not we will need any depositions.

THE COURT: Very well. Thank you all for coming.

* * * * * * * *

I certify that the foregoing is a complete and accurate transcription of my shorthand notes taken herein.

E.F. KNISLEY, Official Reporter, USDC, WDNY.

Order Granting Defense Counsel Leave To Take Further Discovery.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

v.

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT,

Defendants

Civil 1967-190

APPEARANCES: HEFFERNAN, SWEET & MURPHY (DAVID L. SWEET, ESQ., of Counsel), Buffalo, New York, for Plaintiff.

FALK, SIEMER, GLICK, TUPPER & MALONEY (EDWARD D. SIEMER and DEANNE C. SIEMER, ESQS., of Counsel), Buffalo, New York, for Estate of Ralph F. Taber.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER (ROBERT M. HITCHCOCK, ESQ., of Counsel), Buffalo, New York, for defendant Joseph P. D'Angelo.

BRENNAN, CALLAHAN, TESSEYMAN, ZELMAN & RUMFOLA (ARNOLD N. ZELMAN and ROSS L. RUMFOLA, ESQS., of Counsel), Buffalo, New York, for defendant Banjamin Manasen.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (VICTOR T. FUZAK, ESQ., of Counsel), Buffalo, New York, for defendant Warren J. Hildebrandt.

Order Granting Defense Counsel Leave To Take Further Discovery.

At a pretrial conference held on March 19, 1975, the court orally granted defense an opportunity to complete discovery in this case before trial on condition that the discovery be promptly made. To insure speedy compliance, the following time table is set. Defense counsel are to serve interrogatories not later than May 1st and plaintiff shall respond not later than June 1st. If the defense determines that depositions are required, it shall immediately schedule and complete them on or before August 1st. At the pretrial meeting defense indicated that after receiving the answers to interrogatories, request for admission pursuant to Rule 36 would probably be filed. These requests shall be filed 30 days after the filing of the answer to interrogatories or the completion of depositions, whichever is later. No adjournment of this schedule shall be arranged for between the parties by stipulation. Adjournments shall only be made after application to the court showing good cause in writing.

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Order Granting Defense Counsel Leave To Take Further Discovery.

So ordered.

John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: April 1, 1975

Motion to Dismiss, By Defendants Taber Instrument Corporation and Estate of Ralph F. Taber.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff,
Civil No. 1967-190
vs.
TABER INSTRUMENT CORPORATION,
et al.,
Defendants.

Motion to Dismiss

Defendants, the Taber Instrument Corporation and the Estate of Ralph F. Taber, hereby move this Court to dismiss plaintiff's action.

The grounds for this Motion, as set forth more fully in the defendants' Memorandum of Points and Authorities, are as follows: (1) plaintiff's action was begun by the service of a summons and complaint on all defendants by May 16, 1967; (2) the last pleading in this action was served on June 15, 1967; (3) on October 25, 1967, plaintiff's counsel certified, by filing a note of issue, that this case was ready for trial and no objection was had from any defendant; (4) plaintiff did not move to trial of this case, and in fact, did nothing except to take one very brief deposition and move to substitute the executors of a deceased defendant, for six years and three months after the filing of the note of issue; (5) on February 14, 1975, plaintiff moved to consolidate this action with Civil Action No. 1967-182, then pending in this Court, but subsequently withdrew the motion before it was decided, and thereafter has done nothing to this date to move this case on to trial; (6) in the interim, defendants have been irreparably injured by the death of at least two critical witnesses and the disappearance or unavailability of other evidence necessary to establish any defense; and (7) under these circumstances where plaintiff bears the full responsibility for an inordinate delay, and the delay causes irreparable injury to defendants, the defendants are entitled to dismissal of the action under Rule 41(b) of the Federal Rules of Civil Procedure.

Defendants respectfully request this Court to dismiss this action.

Edward D Siemer

Edward D. Siemer
2200 Main Place
Buffalo, New York, 652-6670

Counsel for defendants,
Taber Instrument Corporation
and The Estate of
Ralph F. Taber

Of counsel:
Falk, Siemer, Glick,
Tuppen & Maloney,
2200 Main Place
Buffalo, New York

April 29, 1975

Motion By Defendants Taber Instrument Corporation to Adjourn Discovery Schedule.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff,

Civil No. 1967-190

vs.

TABER INSTRUMENT CORPORATION,
et al.,

Defendants.

Motion to Adjourn Discovery Schedule

Defendants, the Taber Instrument Corporation and the Estate of Ralph F. Taber, hereby move this Court for an extension of time in which to serve interrogatories until 10 days after the defendants' Motion to Dismiss, now pending before this Court, is heard and decided.

The grounds for this Motion are as follows: On April 1, 1975, the Court ordered that interrogatories be served by defendants by May 1, 1975 and that adjournments be made only after written application to the Court showing good cause. On April 29, 1975, defendants filed and served on plaintiff a Motion to Dismiss on the ground that, under Rule 41(b), Federal Rules of Civil Procedure, plaintiff's inordinate delay of almost eight years in bringing this action to trial and the resulting irreparable injury to defendants entitle defendants to a dismissal of plaintiff's action. Decision of that Motion may make defendants' interrogatories unnecessary, and in any case, defendants are prepared to serve their interrogatories within 10 days after decision of that Motion, should plaintiff prevail, so that the delay will be minimal.

Defendants respectfully request that the extension of time be granted.

Edward D. Siemer
2200 Main Place
Buffalo, New York
652 - 6670

Counsel for defendants
Taber Instrument Corporation
and the Estate of Ralph F.
Taber

Of counsel:
Falk, Siemer, Glick, Tuppen
& Maloney
2200 Main Place
Buffalo, New York

April 29, 1975

Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff,

-v-

Civil No. 1967-190

TABER INSTRUMENT CORPORATION, _et al_.,

Defendants.

Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss

This is an action brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.§ 78j(b), seeking equitable relief in the form of rescission or in the alternative, money damages.

Plaintiff alleges that he sold 600 shares of Taber Instrument Corporation stock to the defendant, Taber Instrument Corporation, at a time when the Taber Instrument Corporation was about to be sold to Teledyne, Inc. Plaintiff alleges that three directors (Messrs. Taber, Hildebrandt and Manasen) and one outsider (Dr. D'Angelo), who are the individual defendants, omitted to inform him of the impending sale, and that he known of the sale, he would not have sold his stock.

Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss.

The defendants deny that there was any impending sale and that there was any fact that any defendant omitted to state to plaintiff, pointing out that plaintiff agreed to sell his stock in May, 1966, and the sale of the corporation did not take place until December, 1966. The defendants set up a further defense arising out of the nature of the transaction in which plaintiff sold his stock. That transaction was by way of settlement of outstanding claims for retirement benefits which the Taber Instrument Corporation had declined to pay to plaintiff on the ground that he had been disloyal and had spent corporate funds for unauthorized purposes and for personal gain. The total payments to plaintiff in the transaction in which he sold his stock were $28,354, or $47.25 per share (for 600 shares). The ultimate price paid other shareholders at the time of the sale to Teledyne was approximately $50.00 per share, therefore plaintiff's bargain was a good one, and he sustained no loss.

Defendants move to dismiss this action under Rule 41(b), Federal Rules of Civil Procedure, because plaintiff has caused an unconscionable delay in moving this case on to trial, and during that delay, there has been irreparable injury to defendants.

Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss.

Statement of Facts

This action was commenced by service of a summons and complaint on all defendants by May 16, 1967. All of the defendants answered promptly. The corporation and the three directors answered on June 7, 1967 and the single outsider answered on June 19, 1967. At the time the complaint was served, Teledyne had taken over all of the assets of Taber Instrument Corporation and it had become the Taber Instrument Division of Teledyne. The transaction between the Taber Instrument Corporation shareholders and Teledyne had been completed and there were no additional developments for plaintiff to await. His damages, if any, had been fixed and the defendants' liability, if any, had been established during this single transaction and the negotiations that preceded it.

Five months after the last answer was served, on October 26, 1967, counsel for plaintiff filed a note of issue certifying that the case was ready for trial.[*] Plaintiff's counsel asked for trial during the term beginning November 14, 1967. No defendant objected.

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[*] The note of issue was filed pursuant to Local Rule 12, as was required at that time.

Then plaintiff embarked on what turned out to be a delay of over seven years.

During all of 1968, plaintiff did nothing, except to file a note of issue on October 31, 1968, again certifying that the case was ready for trial.*/

During all of 1969 plaintiff did nothing. That year plaintiff did not even make the minimal effort of filing a note of issue.

When nothing at all had been done in over a year, the clerk gave notice on February 6, 1970 that an order of dismissal would be entered at the call of the dismissal calendar on March 13, 1970.**/ At the call of the dismissal calendar, plaintiff expressed an intention to take some action. The court stayed the dismissal until June 12, 1970, provided that the action would then be dismissed unless good cause were shown in writing. Prodded into action by the threat of a dismissal, plaintiff did not seek to set the action down for trial. Instead, a single deposition was noticed for May 29, 1970. That deposition, of defendants' counsel Charles McDonough, was quite plainly aimed only at forestalling a dismissal, not at discovering any new facts.*/ The deposition was most abbreviated, the entire transcript covering only 27 pages. On October 27, 1970, plaintiff's counsel again filed a note of issue certifying that the case was ready for trial, and requesting trial during the term beginning in November, 1970.

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*/ Local Rule 12 requires that a new note of issue be filed for each term subsequent to the term in which the initial note of issue is filed.

**/ This action was taken pursuant to Local Rule 11 which provides that the clerk shall issue such a notice 30 days before the opening of each term if no action has been taken by the parties for one year preceding.

The deadline for filing a note of issue for the March, 1971 term passed without any action from plaintiff and that caused the court to take action again looking to a dismissal for failure to prosecute. On March 2, 1971, having awakened briefly, the plaintiff filed a motion for permission to file a note of issue for the March term nunc pro tunc. That motion was granted and the note of issue was duly filed, again certifying that the case was ready for trial. The Court then scheduled a pre-trial conference for April 2, 1971 and ordered that plaintiff submit a detailed statement of facts, a statement of legal issues, a list of exhibits, a list of possible witnesses, and a list of depositions to be used at trial. Plaintiff submitted nothing. However, later that year, on October 28, 1971, plaintiff did file another note of issue.

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*/ By order dated June 26, 1970, the case was reinstated.

In 1972, the case was sent to the magistrate to complete pre-trial proceedings. The magistrate set a pre-trial conference for August 17, 1972, and again ordered plaintiff to submit a statement of facts and lists of witnesses, exhibits, and deposition testimony to be used. That pre-trial conference was held but no submission was filed by plaintiff. The magistrate scheduled another pre-trial conference for December 13, 1972, accompanied by a similar order to prepare the necessary pre-trial documents. That pre-trial conference was postponed.

In February, 1973 the plaintiff finally filed a pre-trial statement. The discussion of the facts in this case took up approximately 11 lines of text. See Pre-trial Statement pp. 6-7. All defendants also filed pre-trial statements and a pre-trial conference was held before the court on March 16, 1973. There was one other faint stirring on plaintiff's part during 1973 caused by the death of one of the principal defendants, Ralph F. Taber, in February,

1973. On August 21, 1973 plaintiff moved to substitute the executors of Mr. Taber's estate as parties defendant. That motion was granted by the court on September 11, 1973. No further action was taken by plaintiff in that year.

In 1974, the court again took the initiative and scheduled a status hearing on February 7, 1974. Shortly thereafter, on February 20, 1974, plaintiff was moved to action once again and filed a motion for consolidation with Civil Action 1967-182 (Less v.Taber Instrument Corporation).However, plaintiff never prosecuted this motion either. After opposition was filed by all defendants, that motion was withdrawn at a pre-trial meeting on June 3, 1974. As a result of that pre-trial meeting, a trial date was set in the Less v. Taber Instrument Corporation case and trial of the Raab case was postponed until the Less case was completed. The Less case was settled on November 8, 1974.

Three months passed after the settlement of the Less case, and the court again scheduled a pre-trial conference in this case for March 19, 1975. At that time the plaintiff's counsel once again affirmed that the case was ready for trial, as it had been since October 26, 1967.

At this point, seven years, 10 months and nine days had passed since the filing of the complaint; seven years, three months and five days had passed since the case was first certified by plaintiff's counsel as ready for trial; and there had been a lapse of six years and three months during which the plaintiff had taken only two positive steps -- the taking of one very brief deposition, and the filing of a pro-forma motion to substitute as parties the executors of a deceased defendant.

That passage of time caused unexpected and irreparable injury to all defendants.

On February 16, 1973, defendant Ralph F. Taber died. Mr. Taber had been president of Taber Instrument Corporation since its founding in 1940. He owned 69% of the voting stock outstanding prior to the sale of the assets of the corporation to Teledyne, Inc. He was Chairman of the Board of Directors continuously from 1940 through 1966. He also served as Chairman of the Board of Trustees of the Profit-sharing Pension Trust, and Chairman of the Profit-sharing Committee, during the entirety of the existence of the trust from 1952 through 1966. Many of the products manufactured by Taber Instrument Corporation had been invented, designed and developed by Mr. Taber himself. Mr. Taber managed the day-to-day activities of the corporation and personally did all of the longer-range planning. No purchase of stock from Mr. Raab, the plaintiff, could have been made without Mr. Taber's authorization. No substantive negotiations or agreement of sale with Teledyne could have been had without his express approval. The testimony at trial, had Mr. Taber survived to testify, would have shown that Mr.Taber was a very successful businessman and a long-time resident of the Buffalo area; he had an excellent reputation in the community. His testimony would have detailed all aspects of these two transactions in which he had played a critical role. Without this testimony and the personal force of Mr. Taber's demeanor evidence, defendants are irreparably handicapped in presenting their defense.

On August 16, 1974, Charles J. McDonough died. Mr.McDonough had been counsel to Taber Instrument Corporation and to Ralph Taber since early 1965. Mr. McDonough represented the pension plan trustees in the litigation brought by Mr. Raab challenging the refusal to pay any benefits on account of his disloyalty. Thereafter Mr. McDonough effected a settlement of that litigation which included the purchase of Mr. Raab's stock by the corporation.

Mr. McDonough was also the principal negotiator for Mr. Taber during the discussions that preceded the sale of the corporation's assets to Teledyne. Mr. McDonough arranged the distribution of Teledyne stock to the Taber shareholders after the sale was completed. Mr. McDonough had practiced law in Buffalo for 47 years. He was a distinguished and able practitioner, a man of honest direction, and a witness of great personal force. Defendants are now without that testimony as well*/ and have no alternative source of proof.

Other evidence has disappeared or become unavailable over time. Mr. Raab had been employed by Taber Instrument Corporation for 11 years at the time he was discharged in 1965. He supervised the Transducer Division which had a large number of employees. He was an officer and director of the corporation and attended management and directors meetings for at least three years. After he was fired, Mr.Raab maintained his contacts with many of his old friends who were present or former employees of Taber Instrument Corporation. Defendants allege that all of the information with respect to the very tentative and totally inconclusive discussions with Teledyne that had occurred prior to the sale of the Raab stock was well known at the Taber plants and had been conveyed to Mr. Raab on a number of occasions by his friends. However, after the passage of seven years, many of these men have died, retired or moved away. Others have found new employment and cannot be located through Teledyne records. Defendants have been deprived of this means of defense.

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*/ In addition, Mr. McDonough's death deprived the defendants of seven years of trial preparation efforts and irreplaceable knowledge of sources of evidence.

Plaintiff's delay has been solely responsible for the irreparable injury to defendants. At no time did defendants object to scheduling this case for trial, and indeed, having been served with successive notes of issue declaring the case ready for trial, defendants had no cause to believe that the plaintiff's delay would continue year after year. At no time did defendants delay or cause plaintiff's efforts in any matter to be extended.

Now, the only two participants for the defendants in the transactions at issue are dead and their testimony is unavailable. The only two participants for the plaintiff in one of these transactions are alive and their testimony is available. The burden of that disadvantage on defendants is crushing and the injury is irreparable. No alternative source of testimony exists. It is uncontroverted that the remaining individual defendants had no personal role in either transaction. No-one can step forward and state the corporation's version of events that led up to these two transactions, and no-one can provide the detailed testimony necessary to rebut plaintiff's circumstantial evidence.

Plaintiff's cause of action should be dismissed pursuant to Rule 41(b), Federal Rules of Civil Procedure, for the reasons that plaintiff has failed to prosecute his cause of action and his delay has caused irreparable injury to defendants.

Argument of Law

The requisites of Rule 41(b) are simple and straight forward. "For failure of the plaintiff to prosecute ... a defendant may move for dismissal of an action or of any claim against him." Fed.R. Civ.P. 41(b). The rule does not require that defendant show any prejudice arising out of the plaintiff's failure or delay. However, in this case, dismissal under Rule 41(b) is made necessary to avoid a very substantial injustice because plaintiff's delay has caused defendants to be put in a position where their defenses can no longer be proved.

I. PLAINTIFF HAS FAILED TO PROSECUTE THIS ACTION.

The plaintiff has failed utterly to prosecute this action since it was first ready for trial in October, 1967. There is no justification for this delay and the plaintiff cannot rely on this court's actions to bring this case to trial as a substitute for plaintiff's own failure to prosecute.

A. Plaintiff Has Not Taken Any Step to Bring this Case to Trial Since It Was First Declared Ready for Trial in October, 1967.

Plaintiff's first note of issue in this case was filed on October 26, 1967. Since that time, plaintiff has done nothing to move the case on to trial. Under the rules of this court, the filing of a note of issue does not automatically bring a case on for trial. Plaintiff's counsel must activate the case when he is ready to try it, and have it set for trial before a particular judge. Plaintiff's counsel is charged with knowledge that unless he did something, the case would not come on for trial in the ordinary course of the court's business. In a similar situation, it was held that:

> "Failure to prosecute under [Rule 41(b)] does not mean that the plaintiff must have taken

> any positive steps to delay the trial or prevent it from being reached by operation of the regular machinery of the court. It is quite sufficient if he does nothing, knowing that until something is done, there will be no trial." Bendix Aviation Corp. v. Glass, 32 F.R.D. 375, 377 (E.D. Pa. 1962), aff'd, 314 F.2d 944 (3d Cir.), cert. den. 375 U.S. 817 (1963).

See also, Forest Nursery Co. v. Crete Carrier Corp., 319 F. Supp. 213, 215 (E.D. Tenn. 1972) (Supp. Order); cf. United States v. Certain Lands, 282 F. Supp. 564, 570 (E.D. N.C. 1968).

Successive notes of issue were filed in 1968, 1969, 1970 and 1971 until the requirement under Local Rule 12 of a current note of issue for each trial term was dropped by the court in 1972. However, the notes of issue were filed by plaintiff only to avoid dismissal, not for the purpose of proceeding to trial.*/

The plaintiff took only two steps in this case on his own initiative during the seven year period from

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*/ When plaintiff had not filed a note of issue in 1970, he was threatened with dismissal. When plaintiff again failed to file a note of issue in 1971, a motion was required to prevent dismissal.

June 27, 1967 when issue was joined to June 26, 1974 when the court ordered that this case be deferred for trial until after the Less case was tried: (1) plaintiff took one very short pro-forma deposition during 1970; and (2) plaintiff made one pro-forma motion to substitute parties during 1973.*/ Neither of those steps is adequate to meet the requirement of prosecution with due diligence.

Discovery conducted in the past is not sufficient to justify a delay after discovery has been completed. In this case, counsel for plaintiff acknowledged before this court at pre-trial conferences on June 3, 1974 and March 19, 1975 that he required no further discovery and no further pre-trial proceedings of any sort in this case.

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*/ There was some activity in the Less case during these years. The plaintiff took the depositions of five persons during 1967; and took further depositions of one person during each of the years 1968, 1969 and 1970.

However, this activity cannot rescue plaintiff from sanctions under Rule 41(b). The depositions taken were only for the Less case, not for this case; and even if they had some bearing on this case, that discovery by plaintiff was completed in 1970, more than four and one-half years ago. Plaintiff has done nothing in the interim that bears on this case at all.

Plaintiff also made a motion in 1974 in the Less case to consolidate the Raab case with the Less case for trial. However that action is of no effect with respect to prosecution of the Raab case because it was withdrawn by plaintiff prior to argument before the court and is of the same effect as no action at all.

In an analogous case, also brought under Rule 10(b)(5) and Section 29(b) of the Securities Exchange Act of 1934, the Securities and Exchange Commission, as plaintiff, filed a motion for a preliminary injunction. The motion was not brought on for hearing until three years later at which time the defendants moved to dismiss under Rule 41(b) and the trial court granted the motion. A three-judge panel, including Hon. Tom C. Clark, Associate Justice, retired, U.S.Supreme Court, sitting by designation, heard the appeal and held as follows:

> "There is no precise rule as to what circumstances justify a dismissal for failure to prosecute. Instead, the procedural history of each case must be examined to make such a determination. Here, we are faced with a three year delay. The SEC attempts to excuse this period of inactivity on the grounds it was conducting discovery to obtain relevant information. The record discloses, however, that the SEC was substantially ready for trial as a result of discovery conducted prior to the institution of the action.
>
> The record also discloses that the SEC made no effort whatsoever to have its motion heard It seeks to place the blame for this upon the trial court, and argues that no local rules exist to inform counsel as to what action, beyond filing of the motion, is required. This does not excuse its failure to diligently prosecute the case. There is no evidence that the motion would not have been heard if requested." Securities and Exchange Commission v. Power Resources Corp., 495 F. 2d 297, 298 -99 . (10th Cir. 1974).

Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss.

Dismissal is available under Rule 41(b) even when extensive discovery has taken place if the plaintiff does not diligently prosecute his action after completing discovery. In S & K Airport Drive-In, Inc. v. Paramount Film Dist. Corp., 58 F.R.D. 4 (E.D. Pa.), aff'd, 491 F. 2d 751 (3d Cir. 1973), some 2,200 pages of testimony were taken in 32 depositions and plaintiff pointed to that effort as evidence of diligent prosecution. However, after discovery was completed, plaintiff did nothing to move the case on to trial and the motion to dismiss under Rule 41(b) was granted. See also Shotkin v. Westinghouse Electric & Mfg. Co., 69 F. 2d 825 (10th Cir. 1948) (a number of motions had been filed over a four-year period, but no progress toward trial had been made; dismissal granted); Russell v. Cunningham, 233 F. 2d 806 (9th Cir. 1956) (case had been at issue for 15 months and court found no sign plaintiff was any nearer to trial; dismissal granted).

In considering the procedural history of this case, it should be noted that plaintiff's counsel delayed for over three years from the time the answer was filed before ever taking a deposition in this case,*/ and no other form of discovery was pursued in the interim.

Then, after a single perfunctory deposition, plaintiff again slumbered for four years until this court began to move the case on for trial during the early spring of 1974. Plaintiff should not be given the benefit of breaking his seven year delay into two parts by the taking of a single deposition. The entire procedural history of the case indicates that the delay and lack of any affirmative action to move the case on to trial was virtually continuous from 1967 to 1974.

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*/ There was a similar delay in the Less case. The depositions of all of the principal witnesses, Messrs. Taber, Hildebrandt, Manasen, D'Angelo and Coulter were taken in 1967. The depositions taken thereafter of Messrs. Till (1968);Bartlo (1969); and McDonough (1970) were perfunctory and could have been completed much earlier. All of plaintiff's essential discovery was completed in 1967.

B. Plaintiff Can Offer No Justification for the Delay.

There are no difficulties inherent in this case that required an inordinately long pre-trial period. There were only four participants in the transaction between Mr. Raab and the Taber Instrument Corp.-- Mr. Raab, Mr. Ness, his lawyer; Mr. Taber, and Mr. McDonough, his lawyer. There were only five participants in the subsequent transaction between Taber Instrument Corporation and Teledyne, Inc. -- Dr. Singleton, who was president and chairman of the board of the buyer, and Mr. Kaufman, his lawyer; Mr. Taber, who was president and chairman of the board of the seller, and his lawyer, Mr. McDonough; and Dr. D'Angelo, the alleged middleman. Plaintiff proceeded only under Rule 30 to obtain oral depositions. Plaintiff never utilized Rules 31, 33, 34 or 36, therefore the discovery proceedings were quite simple. Plaintiff took the deposition of Mr. McDonough in this case, and the depositions of Mr. Taber (in 1967) and Mr. McDonough (again in 1970) in the Less case.

Plaintiff never took the deposition of Mr. Ness. Plaintiff once made a brief attempt to take the depositions of Messrs. Singleton and Kaufman in 1968, but once accorded the right to take the depositions in California, plaintiff never followed up to do that and now avers that those depositions are not necessary. It is inescapable that all of the necessary discovery in this case was completed no later than August, 1967 when Mr. Taber's deposition was completed. Nothing inherent in this case required any delay beyond that year.

Defendants have never acted to delay bringing this case to trial. Defendants never moved against any note of issue filed by plaintiff and from the record of this case must be presumed to have been ready to try the case at any time. Defendants never moved to bring the case on to trial, but that is of no comfort to plaintiff under Rule 41(b). The rule places the burden of going forward to trial squarely on the plaintiff. Defendants are entitled to do nothing, and to assume, after the passage of time, that plaintiff is not serious about his claim and might never bring it to trial. As the court held in S & K Airport Drive-In v. Paramount Film Dist. Corp., 58 F.R.D. 4,7 (E.D. Pa.), *aff'd*, 491 F. 2d 751 (3d Cir.1973):

> "Plaintiff argues that the delay in this case is partly attributable to the defendant's inaction. I cannot agree that it is the defendant's duty to urge plaintiff and his counsel to move quickly to trial. 'The responsibility is squarely up to the plaintiff and his attorney.'"

See also Bendix Aviation Corp. v. Glass, 32 F.R.D. 375, 387 (E.D. Pa. 1962), aff'd, 314 F. 2d 944 (3d Cir.), cert. den. 375 U.S. 817 (1963); Hicks v. Bekins Moving & Storage Co., 115 F.2d 406, 409 (9th Cir. 1940); Cf. Ordnance Gauge Co. v. Jacquard Knitting Machine Co., 265 F. 2d 189 (3d Cir. 1958).

The court has never hindered plaintiff's progress toward trial, and plaintiff cannot complain that the court did not set an earlier trial date that would have protected him from a motion to dismiss under Rule 41(b). The court's power to control its calendar and to avoid unnecessary delay cannot excuse plaintiff from the obligation to move his action along for trial. Indeed, it has been only through the action of the court that this case has moved at all. In 1971 the court began to prod plaintiff by setting a pre-trial meeting. In 1972 there was a further effort in this direction by assigning the case to a magistrate for completion of the pre-trial documents. In 1973 the court finally succeeded in wresting from plaintiff a pre-trial memorandum, that had been first ordered in

1971. Even with the pre-trial memorandum completed, no action was taken by the plaintiff until the spring of 1974 when the court once again began to push the case toward trial.

It is important to distinguish here between actions that the plaintiff took when forced by the court to make a move, and the actions that the plaintiff took of his own initiative. Only the latter could support a defense against a Rule 41(b) motion, and in the latter category, plaintiff has nothing at all.

II. PLAINTIFF'S FAILURE TO PROSECUTE HAS CAUSED IRREPARABLE INJURY TO DEFENDANT SUCH THAT IT IS INEQUITABLE NOW TO PERMIT PLAINTIFF TO CONTINUE WITH THE ACTION.

Plaintiff comes to this court seeking equitable relief in the form of rescission of his contract with defendant Taber Instrument Corporation and a restoration to his prior position. However, plaintiff cannot seek equity without clean hands and in this case, where plaintiff's delay has worked a crippling hardship on defendant, to permit plaintiff to continue with his action now would be inequitable. This circumstance rises over and above Rule

41(b) because that rule does not require that plaintiff's failure to prosecute work any disadvantage to defendant in order that defendant may prevail on a motion to dismiss.

A. Defendants' Only Defenses Require Oral Testimony that Is No Longer Available.

Defendants have essentially two defenses to the allegations of plaintiff's complaint: (1) that there was no omission to state a material fact because the fact alleged by plaintiff never existed; and (2) if there was an omission to state a material fact, it was harmless because plaintiff knew the fact from other sources and did not rely on defendants' omission. Both of these defenses require oral testimony that is no longer available.

(1) Defense of no omission to state a material fact.

Plaintiff's complaint alleges that defendants failed to state that active negotiations had taken place between Teledyne, Inc. and Taber Instrument Corp. and that an agreement in principle on the sale of Taber Instrument Corp. had been reached prior to the time that Mr. Raab sold his stock back to Taber Instrument Corporation.

As noted above, there were only five participants in the transaction between Teledyne and Taber Instrument Corp. -- the principals, Mr. Taber and Dr. Singleton; their lawyers, Mr. McDonough and Mr. Kaufman; and the middleman, Dr.D'Angelo. These are the only sources of evidence with respect to plaintiff's central contentions.

Plaintiff will offer the following evidence to establish the existence of "active negotiations" and an "agreement in principle":

1. a meeting between Dr.Singleton, Mr. Taber and Dr. D'Angelo in California in January, 1966;
2. one or more contacts between Dr. Singleton and Dr. D'Angelo in February and March, 1966;
3. a visit by Dr. Singleton to the Taber Instrument Corporation plant in March or April of 1966;
4. one or more contacts between Dr. Singleton and Dr. D'Angelo; and one or more contacts between Dr. D'Angelo and Mr. Taber in April and May, 1966;
5. a draft contract sent by Mr. Kaufman (on behalf of Dr. Singleton) to Mr. Taber in May, 1966;
6. some correspondence between Mr. Taber and Mr. Mc Donough and Dr. Singleton and Mr. Kaufman in May and June, 1966; and
7. a meeting between Messrs. Singleton,Kaufman, Taber and McDonough in Buffalo in June, 1966.

Plaintiff will argue that the plain inference of this pattern of contacts was that substantial negotiations had taken place, and that an agreement in principle had been reached. Presumably Dr. Singleton and Mr. Kaufman could testify as to their version of the contacts and whether they thought the negotiations were getting anywhere at this early state.

However, the only person who can testify that whatever negotiations, if any, had taken place were indeed not substantial negotiations as alleged by plaintiff, is Mr. Taber himself. Only Mr. Taber could testify that he had had numerous offers to buy Taber Instrument Corp. over the years and that he had turned them all down because of his personal pride and involvement in the corporation that he had built from scratch over a period of 25 years. Only Mr. Taber could testify to the sense of personal satisfaction in having the chairman of the board of an industrial giant like Teledyne take a personal interest in his corporation, and the sense of curiosity about what his corporation was worth on the current market that led to the very informal discussions between the two men. Only Mr. Taber could testify that he was not actively negotiating to sell Taber Instrument Corporation to Teledyne, and was indeed not intending to sell it to anyone at the time he approved the purchase of Mr. Raab's few shares of stock.

Without Mr. Taber's testimony, defendants cannot prove the defense of no omission to state a material fact and cannot even supply a foundation for the documentary evidence that rebuts any contrary circumstantial evidence.*/ The Taber Instrument Corporation was the personal fiefdom of Mr. Taber and no-one else had any input to the decision on whether to sell it.

---

*/ Defendants are also seriously handicapped because plaintiff took Mr. Taber's deposition in another case (the Less action, Civ. No. 1967-182) and now seeks to use that deposition in this case. Plaintiff never expressed any intention that this deposition should cover both the Less case and the Raab case, and indeed Mr. Raab's name is nowhere mentioned in the 251 pages of transcript. Mr. Taber responded to the questions of plaintiff's counsel with very limited answers and the questioning was generally hostile. Thus defendants are now left with a cold transcript in another case in which only the information called for by plaintiff is set forth. The prejudice to defendants and the severe handicap to the defense is readily apparent.

One possible alternative source of testimony for defendants was Mr. McDonough who represented Mr. Taber and the Taber Instrument Corporation in both the transaction with Mr. Raab and the transaction with Teledyne. Mr. McDonough refused to disclose the substance of his conversations with Mr. Taber when he was deposed, and plaintiff never moved to compel this disclosure. At trial, had Mr. Taber and the corporation waived the attorney-client privilege, Mr.McDonough could have supplied testimony to support Mr. Taber's version of the facts. He could have testified that Mr. Taber was not interested in the exploratory offer made by Teledyne and did not even bother to send the draft contract to him until some weeks after it arrived from Teledyne's lawyers. He could have testified as to Mr. Taber's instructions with respect to the Teledyne matter and as to the entirely separate set of circumstances out of which the Raab transaction arose. Mr. McDonough had represented the corporation in all of the various pension fund claims by former employees and was familiar with Mr. Taber's purpose in retrieving stock in his company from these employees who had allegedly been converting the corporation's money and property to their own personal benefit. The pension fund claims were a lever for retrieving that stock and repurchase of the stock was an integral part of the settlement of those claims.

No-one other than Mr. Taber and Mr. McDonough took part in those plans to retrieve the company's stock. There is no other source of evidence with respect to this part of the defendants' defense, now that both Mr. Taber and Mr. McDonough are dead.

In Drees v. Waldron, 212 F. 93 (8th Cir. 1914), the original defendant died during a seven-year delay by plaintiff. The court discussed at length the effect of this loss on the ability to maintain a defense:

> "Assuming that the passing of over seven years would not of itself constitute a barrier to this motion [by plaintiff to vacate a discharge in bankruptcy to Armstrong], that interval in the light of the death meanwhile of Armstrong becomes most important. The effect of Armstrong's death, of course, was to deprive his side of the controversy of his testimony upon all of the issues above referred to, and perhaps upon others that might become relevant. This was a very substantial disadvantage to respondents. True, as counsel suggests, there is an Iowa statute which prevents a party and his wife from testifying as to transactions with the opponent where the latter is dead, and this to some extent mitigates the absence of Armstrong's testimony, since, upon these matters, it debars Drees and his wife from the stand. But it is by no

means certain that this will fully meet the situation. It is entirely conceivable that parties other than Drees and his wife heard statements by Armstrong upon one or more of the issues in the case, which statements, if proved, must go entirely uncontradicted upon the trial because of Armstrong's absence by death. There may be other respects in which his testimony would upon the trial be found relevant and desirable. We cannot anticipate all of these, nor do we feel called upon to enter into any close calculation as to them. It is sufficient upon this point that within reasonable probabilities based upon human experience there will be highly material matters as to which Armstrong's testimony will be important. It is also urged by counsel that the facts provable by Armstrong could be established by other witnesses. Perhaps so, perhaps not. Whether this would be true or not could be disclosed only by the trial and must remain uncertain until then. Viewing the matter also from the standpoint of human probabilities, however, we are impressed with this fact: Armstrong were he alive would undoubtedly know as to these various matters, he was the actor in them, his absence relegates the respondents to the recollection of third parties or of persons only secondarily interested, a recollection necessarily affected by the seven or more intervening years. On the other hand, had this application been brought seasonably to hearing, the necessity upon respondents to seek their testimony from uncertain and secondary sources would not have existed. To countenance this delay is in our judgment to impose an unjust and unfair disadvantage upon one of the parties and this we cannot do." Id. at 95-96 [Emphasis the court's].

In a similar case, Lamborn v. American Ship & Commerce Navigation Corp., 76 F. 2d 363 (9th Cir.) cert. den. 296 U.S. 581 (1935), the court observed:

> "If by the laches and delay of the complainant it has become doubtful whether adverse parties can command the evidence necessary to a fair presentation of the case on their part, as, for instance, where parties interested and witnesses have died in the interim, or if it appears that they have been deprived of any advantages they might have had if the claim had been seasonably insisted on, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief . . . ." Id. at p. 367.

Plaintiff's delay is solely responsible for the loss to the defendants of the testimony of Mr. Taber and Mr. McDonough. Had the case been tried promptly, in 1967 or 1968; or even under a fairly lengthy delay in 1970 or 1971, after all of plaintiff's discovery had been completed, this testimony would have been available. The risk that a key witness will be lost to defendant is one that plaintiff must bear when he engages in unseemly delay. Should that risk be realized, then the defendant will have grounds to dismiss and the plaintiff must bear that consequence of the risk that he elected to run.

[illegible] Defense of no reliance.

Plaintiff cannot be heard to complain of defendants about an omission to state a material fact if he became aware of the material fact from another source and thus did not rely on any omission by defendants to state that fact.

There had been numerous offers to buy the Taber Instrument Corporation from many different sources during the five years that preceded the sale to Teledyne, Inc. Mr. Taber was justifiably proud of the interest in his company and often discussed these offers with his senior management employees. The existence of these offers and Mr. Taber's uniform rejection of them was well-known to many Taber employees.

Mr. Raab was one of the senior management employees of the corporation from 1964 through February, 1965 when he was fired. At the time he was fired, Mr. Raab was the Manager of the Transducer Division. He supervised a large number of employees and was personally acquainted with all of the other senior management employees. After Mr. Raab's departure from the corporation, he kept in touch with a number of employees and former employees of the corporation. Through them he learned of Dr. Singleton's visit to the Taber plant in March, 1966, and of Teledyne's interest in purchasing the corporation. However, because of Mr. Taber's uniform rejection of such offers in the past, Mr. Raab discounted any possibility that Mr. Taber would sell his company.

Mr. Raab's lack of reliance on any omission by Mr. Taber or Mr. McDonough to disclose the fact of the Singleton visit and the prior and subsequent contacts between Taber Instrument Corp. and Teledyne is a defense available to all of the defendants. However, the passage of time and plaintiff's delay have caused the loss of defendants' evidence with respect to this defense as well. Senior and other employees of the Taber Instrument Corporation with whom Mr. Raab had contact in 1965 and 1966 have died, retired, left their employment and moved away. Those who are still alive cannot now be located from Teledyne's records, and their whereabouts are unknown to defendants. Even if they could be located, the intervening years have inevitably dimmed memories and substantially impaired the ability to present firm and convincing testimony.

Defendants need not do more than show their need for the testimony from these witnesses. Where there is unreasonable delay, there is a presumption of injury to defendants' defenses. Alexander v. Pacific Maritime Ass'n., 434 F. 2d 281, 283 (9th Cir. 1970), cert. den. 401 U.S. 1009 (1971); States Steamship Co. v. Phillipine Air Lines, 426 F. 2d 803, 804 (9th Cir. 1970); Pearson v. Dennison, 353 F. 2d 24, 28, (9th Cir. 1965); Bernays v. Frederick Leyland & Co., 228 F. 913, 914, (D. Mass. 1915).

B. No Subsequent Actions by Plaintiff Can Excuse the Harm Caused by the Delay.

None of plaintiff's actions of late, prompted by this court's demands that the case be moved on for trial, can overcome the effect of his past inaction over a long period of time. There was a similar situation in Sheaffer v. Warehouse Employees Union, 408 F. 2d 204 (D.C. Cir), cert. den.395 U.S. 934 (1969) where the plaintiff proceeded in a dilatory fashion from August, 1963 when the complaint was filed until November, 1967 when new counsel was appointed. A trial date was set for Janu~~r~~ary 9, 1968. On January 5, 1968 the defendants moved to dismiss under Rule 41(b) and their motion was granted. Upholding the trial court's order, the appellate court found:

> "Appellants' lethargy ceased on November 6, 1967, when their present counsel entered the case as co-counsel. We find, however, that after over four years of procrastination his arrival came too late to save appellants' cause of action." Id. at 205.

The court held that "the trial judge did not abuse his discretion in dismissing for want of prosecution, notwithstanding the impending January 9th trial date". Id. at 206, n. 2. See also Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406 (9th Cir. 1940) (where the court pointed out, "... subsequent diligence is no excuse for past negligence". Id. at 409).

It is plain on the face of the record that plaintiff has delayed without justification. In so doing, plaintiff incurred a two-fold risk: that defendants would move to dismiss under Rule 41(b) and that something would happen to one or more of defendants' witnesses making it more likely that defendants' motion to dismiss would be granted. Plaintiff's counsel knowingly took that risk.

Nothing that has been done by plaintiff since the spring of 1974, when this court required various actions, can save plaintiff from the inordinate delay from the summer of 1967 to that date.

CONCLUSION

For the reasons stated above, defendants, the Taber Instrument Corporation and the Estate of Ralph F. Taber, respectfully submit that the Motion to Dismiss should be granted.

Respectfully submitted,

Deanne C. Siemer
2200 Main Place
Buffalo, New York
Tel. 852 - 6670

Counsel for Defendants
Taber Instrument Corporation and
the Estate of Ralph F. Taber

Of counsel:
Falk, Siemer, Glick, Tuppen
& Maloney
2200 Main Place
Buffalo, New York

Dated: April 29, 1975.

Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss.

~~STATE OF NEW YORK~~ UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YO

Index No. Year 19

JUNIA E. RAAB,
Plaintiff,

-v-

TABER INSTRUMENT CORPORATION,
et al.,
Defendants

COPY **MEMORANDUM OF POINTS AND AUTHORITIES**

Falk, Siemer, Glick, Tuppen & Maloney
Attorneys for Defendants
2200 ERIE COUNTY SAVINGS BANK BUILDING
BUFFALO, NEW YORK 14202
AREA CODE 716 852-6670

TO: *Attorney(s) for*

PLEASE TAKE NOTICE that an *of which the undersigned attorney(s) certifies (certify) to be a tru* *complete copy, was duly granted in the within-action on the* *day of* *, 19* *, and duly entered in the office c* *Clerk of the County of* *on the* *day of* *, 19* *.*

DATED: *, 19*

Yours, etc.,

Falk, Siemer, Glick, Tuppen & Maloney
Attorneys for

RECEIVED
APR 29 1975
CLERK, USDC WDNY

Original
filed

DUE AND PERSONAL SERVICE of the within paper(s) and of the Notice hereon endorsed is admitted this *day of* *, 1*

Attorney(s) for

AFFIDAVIT OF SERVICE BY

STATE OF NEW YORK } *ss.:*
COUNTY OF

, being duly sworn, deposes and says: that deponent is not a party to this action and is over 18 years *that on the* *day of* *, 19* *, deponent served the within upon* *, attorney(s) for the* *in this action, at the address(es) designated by said attorney(s) for that pu* *in the preceding paper(s) in this action by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in a official depo* *under the exclusive care and custody of the United States post office department within the State of New York.*

Sworn to before me, this *day of* *, 19* *.*
My commission expires
Notary Public, Erie County, N.Y.; Commissioner of Deeds, Buffalo, N.Y.

VERIFIC

STATE OF NEW YORK } *ss.:*
COUNTY OF
OF

Being duly sworn, I hereby depose and say that I am *the* *in this action; that I have re* *foregoing and know the contents thereof; that it is true of my own knowledge, except as to the matters therein stated to be alleged upon infor* *and belief and as to those matters, I believe it to be true. The grounds of my belief as to all matters not stated upon my knowledge are correspon* *and other writings furnished to me by the* *and interviews with officers and employees of the* *; the reason w* *verification is not made by the* *is that there is no officer presently in Erie County.*

Sworn to before me, this *day of* *, 19* *.*
My commission expires
Notary Public, Erie County, N.Y.; Commissioner of Deeds, Buffalo, N.Y.

Affidavit of Deanne C. Siemer.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff,

vs. Civil No. 1967-190

TABER INSTRUMENT CORPORATION,
et al.,
Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

AFFIDAVIT

Deanne C. Siemer, being first duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York.

2. On February 21, 1974, Edward D. Siemer was substituted for Charles McDonough as attorney for the Estate of Ralph F. Taber in the above-entitled action and I began to assist him with preparation of the case for trial.

3. By order of this court dated July 24, 1974, a receiver was appointed for the Taber Instrument Corporation. Subsequently the receiver engaged Edward D. Siemer to

represent the corporation in the above-entitled action and I began to assist him with respect to preparation of the corporation's defense as well.

4. Upon information and belief, on August 16, 1974 Charles J. McDonough died. From early 1965 to July, 1974 Mr. McDonough had represented both Mr. Taber and the Taber Instrument Corporation in this and other matters. The information upon which this belief is based was obtained from Mr. McDonough's files and Robert Boasberg of the law firm of McDonough, Boasberg and McDonough.

5. On or about September 20, 1974, Mr. McDonough's files in the above-entitled matter and related litigation were delivered to me.

6. I have read the material in Mr. McDonough's files; I have read the pleadings and other papers filed in this matter with the clerk of this court; I have read the deposition and plaintiff's and defendants' exhibits in this case and I have consulted with counsel for the other defendants in this matter. I have taken the same actions with respect to Civil Action No. 1967-182 entitled Less v. Taber Instrument Corporation.

Affidavit of Deanne C. Siemer.

7. Upon information and belief, at the time the complaint was served in this action, Teledyne, Inc. had taken over all of the assets of Taber Instrument Corp. and it had become the Taber Instrument Division of Teledyne. The transaction between Taber Instrument Corp. and Teledyne had been completed. The information upon which this belief is based was drawn from the closing documents in the Taber Instrument Corp.- Teledyne transaction; the McDonough files; and the depositions in the Less case.

8. Upon information and belief, on February 16, 1973, Ralph F. Taber died. His executors are the Marine Midland Bank-Western and his wife, Cindy R. Taber. The information upon which this belief is based was drawn from the records of Marine Midland Bank - Western and an interview with Mrs. Taber. They were substituted as parties defendant in this action by order of the court dated September 11, 1973.

9. Upon information and belief, Ralph Taber had been president of Taber Instrument Corporation since its founding in 1940. He owned 69% of the voting stock outstanding prior to the sale of the assets of Taber Instru-

ment Corporation to Teledyne in December, 1966. He was Chairman of the Board of Directors continuously from 1940 through 1966. He also served as Chairman of the Board of Trustees of the Profit-sharing Pension Trust, and Chairman of the Profit-sharing Committee, during the entirety of the existence of the trust from 1952 through 1966. The corporation manufactured a number of products, many of which Mr. Taber had designed and developed personally. Mr. Taber managed the day-to-day activities of the corporation and personally did all of the longer-range planning. No purchase of stock from Mr. Raab, the plaintiff in this action, could have been made without Mr. Taber's authorization. No agreement of sale to Teledyne could have been made without his express approval. Mr. Taber had reviewed most of the documents and was personally involved in or directed each of the substantive negotiations that preceded the sale to Teledyne. Mr. Taber was a very successful businessman and a long-time resident of the Buffalo area. He had an excellent reputation in the community. Mr. Taber would have been an effective witness of great personal force. The information upon which this belief is based was drawn from the records of the Taber Instrument Corporation, the depositions taken in the Less case, the McDonough files, and an interview with Warren J. Hildebrandt.

10. Upon information and belief, Mr. McDonough was retained by Mr. Taber in early 1965 to represent the corporation in a number of matters. Among those matters were the claims with respect to pension funds made by employees who had been discharged by Mr. Taber for disloyalty. One of these pension-fund claims was that made by Mr. Raab. Mr. McDonough effected a settlement of that litigation which included the purchase of Mr. Raab's stock by the corporation. After May, 1966, Mr. McDonough was also the principal negotiator for Mr. Taber during the discussions that preceded the sale of the corporation's assets to Teledyne, Inc. Mr. McDonough distributed the Teledyne stock to the Taber Instrument Corp. shareholders after the sale transaction was completed. Mr. McDonough had practiced law in Buffalo for 47 years. He was a distinguished and able practitioner, a man of honest direction, and would have been a witness of great personal force. The information upon which this belief is based was obtained

from Robert Boasberg, the McDonough files, the depositions taken in this case and the Less case, and interviews with Mr. McDonough prior to his death.

11. Upon information and belief, Mr. Raab had been employed by the Taber Instrument Corp. for 15 years at the time of his discharge in 1965. He supervised the Transducer Division which had a large number of employees. He was an officer and director of the corporation and attended management and directors meetings for at least three years. He was acquainted with other senior management employees. After he was fired, Mr. Raab maintained his contacts with many of his old friends who were present or former employees of the Taber Instrument Corp. However, after the passage of seven years, many of these men, died, retired or moved away. Others found new employment and cannot be located through Teledyne records. They are unavailable to defendants. The information upon which this belief is based was drawn from the records of the Taber Instrument Corporation, the McDonough files, an interview with Mr.McDonough prior to his death, and an interview with Warren J. Hildebrandt.

Affidavit of Deanne C. Siemer.

12. Upon information and belief, there were only four participants in the negotiations and transaction between Mr. Raab and the Taber Instrument Corp. They were Mr. Raab and his attorney, Mr. Ness, and Mr. Taber and his attorney, Mr. McDonough. There were only five participants in the negotiations and transaction between Taber Instrument Corp. and Teledyne Inc. They were Mr. Singleton, who was president and chairman of the board of Teledyne, and his lawyer, Mr. Kaufman; Mr. Taber and his lawyer Mr. McDonough; and a middleman, Dr. D'Angelo. The information upon which this belief is based was drawn from the depositions and exhibits in this case and the Less case; interviews with Messrs. Singleton, Kaufman and McDonough; a review of Mr. Kaufman's files; and a review of Mr. McDonough's files.

13. Only two of the participants in both of these transactions, Mr. Taber and Mr. McDonough, could testify to the facts necessary to the defendants' defense against Mr. Raab's allegations. They are both now dead and their testimony is unavailable. The plaintiff took Mr. Taber's deposition in the Less case in 1967. At that time, plaintiff never expressed, on the record, any intention that

this deposition should cover both the Less case and the Raab case. I have been unable to find any document indicating any such intention. I have examined the transcript of Mr. Taber's deposition. Mr. Taber responded to the questions of plaintiff's counsel with very limited answers and the questioning was generally hostile. There was no cross-examination of Mr. Taber to elicit facts helpful to the defense. The plaintiff also took Mr. McDonough's deposition, once in the Less case and again in the Raab case. On both occasions Mr. McDonough refused to divulge any information covered by the attorney-client privilege and plaintiff never challenged that claim of privilege. Therefore none of the details of the negotiations from defendants' side are available in the recorded testimony.

14. It is my opinion that there are two principal defenses available to defendants in this case. Those are the defense (1) that there was no omission to state a material fact because the fact alleged by plaintiff (that there were substantial negotiations and/or an agreement in principle) does not exist; and (2) that even if there was an omission to state a material fact, it is of no

consequence because there was no reliance by plaintiff. It is also my opinion that the testimony of Mr. Taber and Mr. McDonough is essential to establishing either of those defenses. Without that testimony, defendants are critically impaired in their ability to defend against Mr. Raab's allegations. It is my opinion that there are no alternative sources of testimony from which the same evidence necessary to these defenses could be had.

14. Upon information and belief, Mr. Taber had had a number of offers to purchase the Taber Instrument Corporation between 1960 and 1966. Mr. Taber discussed those offers with senior management employees because he was proud of the reputation achieved by the corporation and its products. However, Mr. Taber uniformly rejected these offers. The information upon which this belief is based was drawn from the files of the Taber Instrument Corporation, an interview with Charles McDonough and an interview with Warren J. Hildebrandt.

/s/ Deanne C Siemer
Deanne C. Siemer

Sworn to before me this
28th day of April, 1975.

Notary Public.

Affidavit of Deanne C. Siemer.

~~STATE OF NEW YORK~~ UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK — Index No. Year 19

JUNIA E. RAAB,
Plaintiff,

-v-

TABER INSTRUMENT CORPORATION,
et al.,
Defendants.

COPY **AFFIDAVIT**

Falk, Siemer, Glick, Tuppen & Maloney
Attorneys for **Defendants**
2200 ERIE COUNTY SAVINGS BANK BUILDING
BUFFALO, NEW YORK 14202
AREA CODE 716 852-6670

Attorney(s) for

TO:

PLEASE TAKE NOTICE that an of which the undersigned attorney(s) certifies (certify) to be a tru complete copy, was duly granted in the within-action on the day of , 19 , and duly entered in the office o Clerk of the County of on the day of , 19 .

DATED: , 19

Yours, etc.,

Falk, Siemer, Glick, Tuppen & Maloney

Attorneys for

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DUE AND PERSONAL SERVICE of the within paper(s) and of the Notice hereon endorsed is admitted this day of , 19

Attorney(s) for

AFFIDAVIT OF SERVICE BY

STATE OF NEW YORK
COUNTY OF } *ss.:*

, being duly sworn, deposes and says: that deponent is not a party to this action and is over 18 years o, that on the day of , 19 , deponent served the within upon , attorney(s) for the in this action, at the address(es) designated by said attorney(s) for that pu in the preceeding paper(s) in this action by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in a official depos under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of , 19

My commission expires

Notary Public, Erie County, N.Y., Commissioner of Deeds, Buffalo, N.Y.

VERIFICA

STATE OF NEW YORK
COUNTY OF } *ss.:*

OF

Being duly sworn, I hereby depose and say that I am the in this action; that I have rea foregoing and know the contents thereof; that it is true of my own knowledge, except as to the matters therein stated to be alleged upon inforn [illegible]

Order Adjourning Discovery Schedule.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

-vs-

TABER INSTRUMENT CORPORATION,
et al.

Civ-1967-190

SIR: Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 1st day of May, 1975, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 1st day of May, 1975.

Dated: Buffalo, New York
May 2, 1975

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

TO: David L. Sweet, Esq.
Attorney for Plaintiff

Deanne C. Siemer, Atty.
Robert M. Hitchcock, Esq.
Arnold N. Zelman, Esq.
TO: Victor T. Fuzak, Esq.
Attorney for Defendant

Order Adjourning Discovery Schedule.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff,

-v-

TABER INSTRUMENT CORPORATION,
et al.,

Defendants

ORDER

The defendants, Taber Instrument Corporation and the Estate of Ralph F. Taber, have moved for an adjournment of the discovery schedule established by order of the court dated April 1, 1975, pending the decision by the court of a Motion to Dismiss made by these defendants and joined by defendant, Warren J. Hildebrandt. The decision of that motion in favor of defendants would make discovery unnecessary, therefore good cause has been shown.

In order to ensure a prompt disposition of the Motion to Dismiss, the following schedule is established: Plaintiff will serve all affidavits and memoranda, if any, in opposition to the Motion on or before May ~~12,~~ 12 1975.

Order Adjourning Discovery Schedule.

Defendants will serve all further affidavits and reply memoranda, if any, on or before May 17, 1975. A hearing on the Motion will be held at 11:00 a.m. on May 19, 1975.

The Motion for Adjournment is granted.

So ordered.

/s/ John T. Curtin
John T. Curtin
United States District Judge

May 1, 1975.

Letter from Victor Fuzak joining in motion to dismiss.

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ATTORNEYS AT LAW
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GROVER R. JAMES, JR.
VICTOR T. FUZAK
GORDON A. MacLEOD
RICHARD E. HEATH
DOUGLAS W. KUHN
RALPH W. LARSON
CLARENCE OBLETZ
HUGH McM. RUSS, JR.
CHARLES J. HAHN
STEPHEN H. KELLY
GEORGE W. MYERS, JR.
JAMES A. PORTER
ROBERT H. MILTENBERGER, II
WILLIAM H. GARDNER
H. KENNETH SCHROEDER, JR.
JOHN J. COONEY
JOHN C. BARBER, JR.
ROBERT M. WALKER
ANTHONY L. DUTTON
JAMES M. WADSWORTH
STEPHEN KELLOGG
DAVID A. GARBUS
DAVID E. HALL
WILLIAM A. DePONCEAU
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COUNSEL

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716-633-6150

May 1, 1975

Hon. John T. Curtin
United States District Court
United States Courthouse
Niagara Square
Buffalo, New York 14202

Dear Judge Curtin:

Re: Junia E. Raab v. Taber Instrument Corporation, et al-Civil 1967-190

We are writing on behalf of Warren J. Hildebrandt to join in the motion for dismissal and for adjournment of the discovery schedule recently filed on behalf of the defendants Taber Instrument Corporation and Estate of Ralph F. Taber.

Respectfully yours,

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By

Victor T. Fuzak

VTF:skw

Copies to: David L. Sweet, Esq.
Edward D. Siemer, Esq.
Robert M. Hitchcock, Esq.
Arnold N. Zelman, Esq.
Harold J. Boreanaz, Esq.

Letter From Ross L. Runfola, Attorney For Benjamin J. Manasen.

LAW OFFICES

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OUR FILE NO. ________

May 2, 1975

Honorable John T. Curtin
United States District Court
United States Courthouse
Niagara Square
Buffalo, New York 14202

RE: Junia E. Raab v. Taber Instrument Corporation, et al - Civil 1967-190

Dear Judge Curtin:

The defendant, Benjamin J. Manasen, joins in the motion made by Taber Instrument Corporation and the Estate of Ralph F. Taber for dismissal of the cause of action and adjournment of the discovery schedule.

Respectfully yours,

ROSS L. RUNFOLA

RLR/lg
cc: ✓David L. Sweet, Esq.
Edward D. Siemer, Esq.
Robert M. Hitchcock, Esq.
Victor T. Fuzak, Esq.

Letter From Phillips, Lytle, Hitchcock, Blaine & Huber, Attorneys For Joseph P. D'Angelo.

COPY

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
FORMERLY KENEFICK, LETCHWORTH, BALDY, PHILLIPS & EMBLIDGE
ATTORNEYS AT LAW

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JOHN K. KIMBALL
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ROBERT M. SPAULDING
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1928-1971

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May 5, 1975

Honorable John T. Curtin
United States District Court
Western District of New York
U. S. Court House
Niagara Square
Buffalo, New York 14202

Re: Junia E. Raab v. Taber Instrument
Corporation, et al
Civil 1967-190

Dear Judge Curtin:

We are writing on behalf of Dr. Joseph P. D'Angelo to join in the motion for dismissal filed on behalf of the defendants Taber Instrument Corporation and Estate of Ralph F. Taber.

Respectfully yours,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER

By

UUr

cc: David L. Sweet, Esq.
Edward D. Siemer, Esq.
Arnold N. Zelman, Esq.
Victor T. Fuzak, Esq.

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff

-vs- CIVIL No. 1967-190

TABER INSTRUMENT CORPORATION,
et al.,

Defendants

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

STATE OF NEW YORK :
SS.
COUNTY OF ERIE :

DAVID L. SWEET being duly sworn deposes and says :

1. I am a member of the firm of HEFFERNAN, SWEET & MURPHY, attorneys for the plaintiff, and am familiar with the facts and circumstances in this action. I submit this affidavit in opposition to the motion of defendants, Taber Instrument Corporation and the Estate of Ralph F. Taber, for dismissal.

2. The affidavits and memorandum submitted by the aforesaid defendants in support of their motion contain grossly inaccurate, unfair and wholly misleading

representations of the facts. They entirely, and apparently deliberately, ignore the relationship between this case and the Less case, in which extensive pretrial discovery and other procedures were had with regard to questions of fact and law common to both actions. Furthermore, the making of this motion at this juncture in the proceedings, after all that has gone before, smacks of nothing less than bad faith.

3. Rather than attempt an item by item refutation of defendants' statements, I will set forth the facts as they appear from our files.

As pointed out in the combined pretrial statement submitted on behalf of the plaintiffs, Less and Raab, both cases were based upon violations of Section 10(b) (27 and 29) of the Securities and Exchange Act of 1934, and Rule 10-b of the Securities and Exchange Commission. In each case it was alleged that Taber Instrument Corporation (hereinafter referred to as "TIC") bought the plaintiff's stock in TIC without disclosing to the plaintiff the fact that serious negotiations were then being conducted with Teledyne, Inc. for the acquisition of TIC by Teledyne, for a proposed price equivalent to approximately $50.00 per TIC share. Less' 14,100 shares of TIC were purchased on May 4th, 1966 for $10.00 per share; Raab's 600 shares of TIC were purchased on June 6th, 1966 for $8.00 per share. Both Raab and Less also received, at the time of the payment for their shares, certain profit sharing monies claimed by them from TIC's Profit Sharing Plan.

In each case the defendants adopted the defense, among others, that there was no failure to disclose a material fact to the plaintiff, in that at the times of the purchase of their shares by TIC, the status of such negotiations with Teledyne was not such as to require disclosure. As is undisputed, the acquisition of TIC by Teledyne was in fact carried out on or about December 30th, 1966, for a price, paid in shares of Teledyne, worth at that time approximately $50.00 per TIC share.

Both Less and Raab sued for rescission of the purchases of their shares by TIC, claiming that had they been informed of the Teledyne negotiations they would have retained their TIC shares, and would have been entitled to participate in the distribution of Teledyne shares, worth approximately $100.00 per TIC share, made to TIC shareholders in May, 1967, on liquidation of TIC.

While the two cases were essentially alike in the foregoing respects, both arising out of similar circumstances and within approximately the same period of time, in which the TIC - Teledyne negotiations were coming to a boil, the financial magnitude of the two claims was vastly different. Less, as the seller of 14,100 TIC shares, had a claim worth potentially more than $1,400,000.00; Raab, as seller of 600 shares, had a claim worth potentially in excess of $60,000.00. Consequently, counsel for all parties in both cases, throughout the entire pretrial proceedings, treated Less as the "lead" case and knew that the basic discovery concerned with the Teledyne-TIC transaction and the liquidation of TIC was taking place in the Less case.

4. The plaintiffs were confronted with the burden of ascertaining, solely through hostile witnesses, the true circumstancess surrounding the timing, nature and extent of the TIC-Teledyne negotiations, to which the plaintiffs were not privy.

On behalf of the plaintiffs we took the depositions of defendants TIC, Ralph F. Taber, Warren Hildebrandt and Joseph D'Angelo, and witness depositions of Leland Coulter, District Manager of the Teledyne-Taber Division, Charles Till of Marine Midland Trust Company, Noel Bartlo, who had acted for D'Angelo in negotiating for the Less stock, and Charles McDonough, who had acted for TIC in the negotiations for the purchase of both the Less and Raab stock.

The defendants took depositions of the two plaintiffs and of my partner, Eugene Murphy, and myself.

In all, during the period July 1967 through October 1972, when discovery was considered completed, depositions were taken on 19 separate occasions.

The matters involved were complex and extensive, and necessarily covered in great detail the negotiations between TIC and Teledyne which began February 1966, and ended with the closing of the TIC acquisition on December 30, 1966, and the liquidation of TIC in May 1967.

Additional complications were presented in dealing with certain defenses asserted in both cases, involving allegations of wrongdoing on the part of the plaintiffs unrelated to the transactions in which their stock was purchased, the execution and delivery by the plaintiffs of releases in favor of some of the defendants. The issue as to the permissible scope of the defendants' examination of the plaintiffs with regard to such matters arose during the initial examination of plaintiff Less, and became the subject of a motion made by defendants and decided by Judge Henderson, after submission of extensive affidavits and briefs.

On several occasions the examinations conducted by us had to be adjourned so that we could go through the massive and largely unsegregated files produced by Mr. Mc Donough and his clients and sort out the many documents and records pertinent to the inquiry.

The examination of Dr. D'Angelo's agent, Mr. Bartlo, had to be taken in two separate sessions; at the first session he refused to answer certain material questions on the grounds of the lawyer-client privilege, and when the privilege was later waived, his examination was rescheduled and completed.

5. The depositions were frequently delayed solely because of the unavailability of one or more of the defendants' counsel. Time after time we would schedule an examination and prepare for it, only to have Mr. McDonough's office notify us at the last minute that he was otherwise engaged and could not attend.

Attached, as Exhibit "A" is a copy of a letter we wrote to Mr. McDonough June 23, 1970, with copies to Messrs.

Hitchcock and Boreanaz, attesting to our efforts to overcome these delays and complete the discovery.

In addition, on several occasions, examinations were postponed to avoid conflict with engagements of Mr. Hitchcock or Mr. Boreanaz.

Our examinations of Mr. McDonough were completed in October, 1970, and in view of subsequent events, proved to be the last depositions taken on behalf of the plaintiffs. However we actively sought additional discovery afterwards, as we will review.

During the course of their discovery examinations, the defendants had adopted the posture that even though it was clear that negotiations with Teledyne had clearly begun by February,1966, and that concededly the acquisition had been consummated in December, 1966, the status of the deal was so uncertain at the times of the purchases from the plaintiffs that no disclosure of the negotiations was required.

Therefore we concluded that we should endeavor to take the depositions of the chairman of Teledyne, Dr. Singleton, and his counsel, Edmund Kaufman, if it could be accomplished in this jurisdiction, since the taking of their depositions at Teledyne's headquarters in California would have required plaintiffs to bear the enormous cost of the expenses of ourselves and all of the defendants' attorneys in attending there. In late 1970 and early 1971, we explored the possibility of Teledyne's producing Dr. Singleton and Mr. Kaufman here. I was initially given to understand by Mr. Kaufman that both he and Dr. Singleton came to the New York area fairly often, and that it might be possible to arrange for the taking of their depositions on such an occasion. However, after further conversations with Teledyne house counsel Spencer Letts in early 1971, it became evident that Teledyne did not intend to voluntarily produce Dr. Singleton and Mr. Kaufman here for such examinations. As a result, on May 5, 1971, we served notices of the taking in Buffalo on May 27, 1971, of the examination of Teledyne, Inc. through its Chairman, Dr. Singleton, and its counsel and assistant secretary, Mr. Kaufman, and had a subpoena duces tecum for such examination served upon Teledyne, Inc. at its North Tonawanda, New York, plant.

Through the Hodgson, Russ firm Teledyne moved for a protective order to quash the subpoena in so far as it would have required the attendance of Dr. Singleton and Mr. Kaufman; extensive briefs and affidavits were filed by both sides, and after argument in July, 1971, the Court decided in favor of Teledyne's application, on October 12, 1971, in a six page decision holding that although Teledyne was doing business within the jurisdiction, and therefore could be required to produce Dr. Singleton here for deposition, the Court felt that in fairness to Teledyne as a non party, and under all the circumstances, Dr. Singleton's deposition would have to be taken at Teledyne's offices in California.

6. In early 1971 we also attempted to take the deposition of defendant Himmelfarb, a resident of Mexico, in the Less case. During the early discovery we had informed his attorney, Mr. Boreanaz, that we would want to take Mr. Himmelfarb's deposition, and he indicated that he would produce him here for that purpose. In late 1970 and early 1971 we discussed this further with Mr. Boreanaz, and he informed us that he would contact his client and make the arrangements. By our letter to Mr. Boreanaz of March 29, 1971 (Exhibit "B" attached) we confirmed our previous discussions on this subject, and requested word from him. We received no reply from Mr. Boreanaz, and therefore by notice given on May 5, 1971 we noticed the taking of Mr. Himmelfarb's examination here on June 7, 1971. Having heard nothing from Mr. Boreanaz by June 1, 1971, we wrote a letter on that date (Exhibit "C" attached) to all counsel con-

firming that Mr. Himmelfarb's deposition was still scheduled for June 7, 1971. Just before the scheduled date, Mr. Boreanaz called us and requested that the examination be postponed briefly so that he could make a motion for a protective order, which he said he had been unable to do as yet because of other engagements. We consented to his request and notified the other counsel.

Since Mr. Boreanaz did not serve his motion promptly we contacted his office several times and requested that he do so, but without result. On August 19,1971, we sent him a letter (Exhibit "D" attached) informing him and other counsel that because of the lapse of time without word from him Mr. Himmelfarb's examination was rescheduled for September 9, 1971. We received no response from Mr. Boreanaz, and on September 9, 1971, we attended at our offices with a court reporter for the examination but neither Mr. Boreanaz nor Mr. Himmelfarb appeared. We then made a motion for an order, based on the foregoing, to strike defendant Himmelfarb's answer, or for other relief. Our motion came on for hearing on October 15, 1971, and after hearing Mr. Boreanaz's explanation that he had been occupied in other matters, the Court excused said default, and also ruled that Mr. Himmelfarb's examination would have to be held in Mexico, unless the plaintiff bore the expense of his attending here.

7. In view of the foregoing determinations and of the heavy expenses already incurred by the plaintiffs in the prosecution of these cases, we decided that we would have to forego taking the examinations of Dr. Singleton and Mr. Kaufman and of defendant Himmelfarb. We then filed notes of issue in both the Less and Raab cases for the November 1971 trial term.

At a pretrial conference held by Magistrate Maxwell in early August, 1972, we confirmed that our own discovery was complete, but that the defendants had indicated they still intended to take depositions of Mr. Murphy and myself.

The defendants thereafter served notices of the taking of the depositions of Mr. Murphy and me on October 14, 1972, and those depositions were completed on October 28, 1972.

8. After the taking of the depositions of Mr. Murphy and me on October 28, 1972, a final pretrial conference was scheduled by Magistrate Maxwell for December 13, 1972. It was adjourned for two weeks to December 28, 1972, at our request because of my illness with pneumonia, and then was

adjourned again by the Magistrate's office because former President Truman's funeral was held on December 28,1972, and the Courts were closed. The Magistrate's office subsequently notified us that the conference was rescheduled for February 7,1973.

We served and filed in advance of the February 7, 1973, conference an extensive combined pretrial statement in the Less and Raab actions, and opposing counsel did likewise, with the exception of Mr. McDonough, who served his combined pretrial statement in the two cases afterwards, on February 9, 1973.

At the conference on February 9, 1973, we made a demand of $1,250,000.00 for settlement of the Less case, and indicated that settlement of the Raab case should be on a proportionate basis, in the proportion that the 600 shares purchased from him bore to the 14,100 shares purchased from Less.

Mr. McDonough said that he felt his clients would not be willing to offer Mr. Less more than their share of a certain escrow fund established against the possibility of a claim by him, and counsel for the other defendants took the same position. With respect to Raab, Mr. McDonough stated that it appeared there would be no difficulty in settling the Raab case once the Less case were resolved, and we said that we agreed.

At the conclusion of the February 7,1973, conference Magistrate Maxwell stated to all counsel that it appeared that the parties were too far apart for settlement and he asked whether the cases were ready for trial. We stated that all pretrial discovery was completed and that we were ready for trial. Magistrate Maxwell then announced that in accordance with our discussion he would mark the two cases ready for trial and refer them to the Court for the scheduling of a trial date.

In preparing this affidavit, I spoke with Magistrate Maxwell on May 8th, 1975, and after reviewing his file he informed me that his notes show that we reported both cases ready for trial at the February 7, 1973 conference, that he so marked them and accordingly referred them to the Court for the scheduling of trial date.

9. Subsequently, a pretrial conference was held before the Court on March 13, 1973. Mr. Hitchcock reported that Ralph Taber had died, on or about February 16th,1973, and that arrangements were being made by his firm to probate the Will appointing Mrs. Taber and Marine Midland Trust Company as executors. He also said that he doubted that his

firm could thereafter represent the Taber Estate in view of an apparent conflict of interest because of their representation of defendant D'Angelo. It was agreed at that meeting that when the representatives of the Taber Estate had been appointed they would be substituted for him in the two actions, and that the question of whether Mr. Hitchcock's firm could continue to represent the Taber Estate would have to be resolved.

Another matter which arose at the March 13, 1973, pretrial was the propriety of attorneys acting as both trial counsel and witnesses. The Court pointed out that since Mr. McDonough and Mr. Murphy and I were listed as proposed trial witnesses, it appeared to be improper for the attorney-witnesses, or even their partners, to conduct trial. We informed the Court that we agreed with this view.

Following the March 1973 conference, I checked from time to time with William Bain, of Mr. Hitchcock's firm, who was handling the probate of the Taber Will,and on July 5, 1973, he informed me that the Will was probated on July 3rd, 1973, and letters issues to the executors. Mr. Bain also informed me on that date that a meeting was going to be held on July 10, 1973, to consider appointing the Falk, Siemer firm as trial counsel for the estate in the two actions.

Shortly after the probate of the Taber Will we served motions for substitution of the Executors in both of the cases, and the Court granted orders of substitution on September 11, 1973.

10. On January 14, 1974, the Court issued a notice of a meeting for status report on February 7, 1974. On January 18, 1974, I called Mr. Siemer and told him that we had learned from Mr. Hitchcock that he understood Mr. Siemer was going to handle this litigation, in place of Mr. McDonough. I asked Mr. Siemer if he could confirm this, and also whether he had received word of the February 7, 1974, date for status report conference. Attached as Exhibit " E " is a copy of a memorandum of our conversation which I made at that time, and which reads in part as follows :

> "Siemer said that he had reviewed the file and the depositions and the code of ethics and had reached the conclusion that McDonough definitely could not try the case. He has yet to submit his written opinion to that effect to the bank and, before doing so, wants to give McDonough the courtesy of con-

> ferring with him and advising him of his conclusion. He has been unable to get together with McDonough because of both their schedules but he has arranged with McDonough to meet with him as soon as McDonough's present trial concludes."

11. The report conference on February 7th, 1974, was attended by Arthur M. Sherwood of Mr. Hitchcock's office, Charles J. McDonough and myself. I informed the Court that we had been waiting for sometime for definite word as to whether Mr. McDonough was to be replaced as trial counsel in these cases by Edward Siemer. Mr. McDonough then announced it had been decided that Mr. Siemer would replace him as counsel for the Estate of Ralph Taber, but that Mr. McDonough intended to remain in the case as trial counsel for defendants Taber Instrument Corporation, Benjamin Manasen and Warren Hildebrandt.

The question of possible consolidation or joint trial of the two actions was also discussed, and it was indicated that Mr. McDonough and Mr. Boreanaz would be in opposition.

The Court then scheduled a further conference on February 22, 1974, stipulating that all counsel including Mr. Siemer were to be present. Subsequently we were notified that that conference was canceled because of the death of Judge Henderson, and that a new date would be set by the Court.

On February 14, 1974, we served formal notice of motion for consolidation or joint trial of the two cases. Mr. Siemer's firm thereafter served a notice of substitution of his firm in the Less case, and the motion was adjourned so that they could prepare opposing papers. In the meantime we loaned them pleadings and other documents in both cases which they requested.

On March 20th, 1974, we received notice of substitution of Mr. Siemer's firm as counsel for the Estate of Ralph Taber in the Raab case.

In view of the strenuous opposition that was being addressed to our application for consolidation or joint trial of the two cases, and to avoid any further preliminary litigation which would delay scheduling of the two cases for trial, we decided to withdraw our motion for consolidation, and wrote to the Court to that effect in a letter dated March 20, 1974, with copies to all counsel, (Exhibit "F" annexed) and asked that the Less case be tried first, with the Raab case to follow. We also informed the Court and counsel that we had arranged for outside trial counsel.

On April 29, 1974, a meeting was held between the Court and counsel. I appeared with our trial counsel, Mr. Montgomery, and stated that we were ready for trial, and joined with Mr. Hitchcock in asking for an early trial date. Mr. McDonough was still counsel of record for defendants, Taber Instrument, Warren J. Hildebrandt and Benjamin Manasen, and the Court then ruled that he could not act as trial counsel because of his status as a witness, and directed that substitute trial counsel be obtained as soon as possible. The Court then adjourned further proceedings until June 3, 1974, for the setting of a trial date.

12. At the meeting on June 3, 1974, it was reported that Arnold Zelman had been retained as trial counsel by Benjamin Manasen and Victor Fuzak by Warren Hildebrandt. Mr. McDonough stated that substitute trial counsel for TIC had not yet been retained, and that he had written to the shareholders that there would have to be a shareholders' meeting to act upon that matter. He also stated that there were now no directors of TIC, both Mr. Hildebrandt and Mr.

Manasen having recently resigned. Miss Siemer then requested that the Court appoint a receiver for TIC, and after some discussion that matter was deferred to June 24,1974 for further consideration.

Attorney Zelman asked for time to consider possible additional discovery, and the Court gave him and Mr. Fuzak until June 24, 1974, to notice any such discovery.

All counsel agreed that the Less and Raab cases be tried separately, that the Less case be tried first, and that the proceedings in the Raab case be deferred until after the Less trial.

Plaintiff requested an early trial date, and Miss Siemer stated that her father, Edward Siemer, would act as trial counsel and could not try the case before October 1974.

Thereafter, in its order dated June 14,1974, (Exhibit " G " annexed) the Court confirmed the foregoing agreement of counsel with respect to deferral of Raab until after trial of Less, and set October 15th, 1974, as the trial date.

13. We proceeded with preparations for trial and in accordance with the Court's direction, worked with Chief Deputy Clerk Walsh in connection with the listing

and marking for trial of the approximately 200 exhibits which had been marked in the pretrial depositions .

From time to time, since March 1974, we had received requests from Mr. Siemer's firm for documents or transcripts which they could not locate readily in Mr. McDonough's files, and on each occasion we promptly furnished them from our own files. We continued this complete cooperation with defendants' counsel during the final pretrial preparations as well.

As the trial date of October 15, 1974, approached certain other matters pertaining to the handling of the trial were disposed of. We made a motion for severance of trial of the underlying circumstances and merits of the several State Court suits referred to in certain affirmative defenses, in order to avoid a multiplicity of trials within the main trial, and after exchange of briefs and affidavits, the motion was argued on July 15, 1974, following which the Court denied the motion.

By order dated July 24, 1974, the Court appointed Edward Carland, a member of the Siemer firm, as receiver for TIC.

14. By letter to the Court dated September 30th, 1974, (Exhibit "H " attached) the defendants requested post-

ponement of the trial date, and by letter to you of October 1, 1974 (Exhibit "I " attached) we opposed the adjournment. The Court granted their request for adjournment.

We continued to make ready for trial, meetings with our witnesses, reviewing the depositions and exhibits, issuing subpoenas, and preparing an extensive trial memorandum of the law involved in the very complex legal issues of the case.

On October 25, 1974, the Court convened a meetingof counsel, and extensive settlement negotiations took place, but without arriving at a settlement, and it was left that trial take place November 5th, as scheduled.

On the eve of trial, settlement of the Less case was agreed upon for the sum of $560,000.00. Statements as to this settlement were put on record in open Court on November 5th, 1974, and the Court then adjourned the matter until December 3rd, 1974, with the understanding that the payment of the settlement sum of $560,000.00 would be made in the meantime and stipulations of discontinuance filed.

At the conclusion of the proceedings on November 5th, 1974, the Court asked about status of the

Raab case. Miss Siemer stated that that case was not ready and that further discovery had to be taken. I informed the Court that was not correct, that discovery had been completed and the case was ready. Miss Siemer stated that we had been discussing the Raab case and that they were attempting to dispose of it on the same basis as the Less case, and the Court then asked that it be informed about the outcome of further settlement discussions in the Raab case.

After the aforesaid November 5th, 1974, Court proceedings, Mr. Siemer and I had occasion to discuss the mechanics of the payment of the Less settlement, and during our conversation he asked me whether we could dispose of the Raab case on the same basis as the Less case. I told him that we felt the Raab case was somewhat stronger than the Less case, and less complicated, and that it therefore deserved a more favorable basis of settlement, and I named a settlement figure. Mr. Siemer said that he would see what he could do and let me know.

The $560,000.00 proceeds of the Less settlement were paid on December 3, 1974, and stipulations of discontinuance immediately filed with the Court. I called Mr. Siemer afterwards about the Raab case, and he told me that he would take it up with the other defendants and would be in touch with me soon. We subsequently had a meeting on Thursday, January 23rd, 1975, and at that time after discussion of the merits of the case and comparison with the Less case, Mr. Siemer named a settlement offer. I told him it was disappointing, in view of our earlier discussions, and entirely unsatisfactory, and that it appeared there was no alternative except to notify the Court and ask to have the case set down for trial as soon as possible.

I called Deputy Clerk Walsh the next morning, January 24th, 1975, and informed him that Mr. Siemer and I had met, but that we were so far apart that settlement appeared impossible, and asked him to so advise the Court and have the case set down for a pretrial conference as soon as possible, so that we could see about entering into any stipulations and arrange for the marking of exhibits. I told Mr. Walsh that a great many of the documents that were to have been marked as exhibits in the Less case would apply also to Raab. Mr. Walsh said that he would so advise the Court.

By notice dated February 13, 1975, a pretrial conference was held on March 19, 1975. I informed the Court that further settlement negotiations had been unavailing, and requested that the case be set down for trial. Miss Siemer said that upon review of the file her firm had determined that additional discovery should be taken, and she requested leave to serve interrogatories, and possibly take additional discovery. I opposed this request, on the basis that her clients had had ample opportunity for such discovery, both during the several years they were represented by Mr. McDonough, and during the period of over a year that her own firm had been officially substituted in the case.

The Court indicated that it was disposed to grant such leave to the defendants, since it could expedite the process of the actual trial, and by order dated April 1, 1975, the Court gave defense counsel until May 1, 1975, to serve interrogatories, and established a time table for completion of any added discovery.

On April 29, 1975, at the very end of the additional discovery period, instead of serving such interrogatories defendants served a motion to dimiss for failure of prosecution.

15. As the foregoing review of the facts shows, there was continuous and diligent activity in the Less and Raab actions on the part of plaintiffs throughout these proceedings. Such delays as occurred were due principally to the great difficulty and complexity of the litigation, the extensiveness of the documentary evidence and testimony required to be covered, the problems entailed in the scheduling of the numerous depositions by the conflicting engagements of the defendants' counsel, and the other matters reviewed above.

In addition, it is clear from the record that at the August 1972 pretrial before Magistrate Maxwell we reported that our discovery was complete in both the Less and Raab cases, that the cases were then held so that the defendants could thereafter, in October 1972, take further discovery (which they could have taken earlier had they chosen to do so) and that when the two cases were next called for pretrial conference in February 1973, we reported them ready for trial, and they were so marked and referred to the Court for scheduling of trial date.

16. It is also clear from the record that the defendants delayed inordinately in arranging for trial counsel for the Taber Estate, TIC, Manasen and Hildelbrandt

following the death of Mr. Taber in February, 1973, after the two cases both had already been reported and marked ready for trial. Although, as shown, the Siemer firm was engaged almost immediately afterwards to review the litigation for consideration of substitution of counsel, they did not get around to being actually substituted until March 1974, more than one year after Mr. Taber's death, and they were not ready for trial until October 1974, more than one year and one half after his death. Had they and their clients proceeded with reasonable dispatch these cases could both have been reached for trial and disposed of well before the death of Mr. McDonough in August, 1974.

17. I will take up lastly the defendants claims of prejudice by reason of loss of the live testimony of witnesses, Ralph Taber and Charles McDonough.

The transcripts of Mr. Taber's depositions, taken on three separate occasions, cover 320 pages, in all, with over 40 exhibits marked. He was examined at length and intensively regarding the matters common to both the Less and Raab actions, namely, the Teledyne negotiations, the eventual consummation of the acquisition of TIC and its liquidation.

Defendants thereafter tookthe deposition of plaintiff, Raab, in October, 1970, and he was examined as to the circumstances surrounding the purchase of his TIC stock, and also as to the allegations of misconduct on his part while a TIC employee which are referred to in the defendants' answers.

At that time, in October 1970, Ralph Taber was, upon information and belief, already an elderly man, nearly 70 years of age. If the defendants, then represented by Mr. McDonough, an experienced and able attorney, genuinely considered Mr. Taber's testimony as to matters not already covered by his depositions important to the defense of the Raab action, presumably they would have taken his further deposition to preserve his testimony. At any rate they had ample opportunity and notice to do so, for Mr. Taber's death did not occur until more than two years later,at age 72, and upon information and belief, he died of a terminal disease which was known for many months before his death.

It seems plain that the defendants deliberately chose not to bother taking Mr. Taber's further testimony because they considered it either not helpful to their defense in the Raab case, or not important. This is especially so since Mr. Taber did not directly participate in the negotiations for the purchase of Raab's stock, which were handled personally and exclusively by Mr. Mc Donough.

With respect to Mr. McDonough's testimony, he too was deposed fully and in detail regarding the Teledyne-TIC transaction, the liquidation of TIC, and the negotiations carried out by him for the purchase of both the Less stock and the Raab stock, and the defendants have his depositions for use at trial.

The fact that Mr. McDonough refused to answer, on the ground of privilege, certain questions we asked him regarding the nature and extent of any evidence of misconduct on the part of Mr. Raab is certainly not the plaintiff's fault, as the defendants seem to imply.

Furthermore, for nearly a year and one half, between the time of Mr. Taber's death in February 1973 and Mr. McDonough's death in August 1974, the Siemer firm had available to them the contents of Mr. McDonough's files, and the benefit of his advice and counsel, and they had ample opportunity to cover with him any possible deficiencies in their pretrial preparations. Here again , as in the case of Mr. Taber, the defendants had ample opportunity to take a further deposition of Mr. McDonough on any issues they considered not already covered by his previous extensive depositions.

David L. Sweet

Subscribed and sworn to before
me this 14th day of May, 1975.

Ruth A. Kolb

Commissioner of Deeds
In and for City of Buffalo
My Commission Expires 12/31/76

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

June 23rd, 1970

Charles J. McDonough, Esq.
McDonough, Boasberg, McDonough, & Beltz
920 Walbridge Building
Buffalo, New York 14202

Re: Less vs. Taber Instrument Corporation, et al
Raab vs. Taber Instrument Corporation, et al

Dear Mr. McDonough :

This will confirm our telephone conversation of June 11th, 1970, in which the taking of your depositions in both of the above cases was rescheduled for Monday, July 13th, 1970, to begin at 10:00 A.M.

Depositions in these cases have been postponed several times at your request. We wish to conclude them so that we can proceed to the other remaining discovery and bring these cases on for trial this fall. Therefore, in fairness to our clients and also to opposing counsel, we must advise you that we will consider the above date to be a firm commitment on behalf of both yourself and opposing counsel.

Incidentally, Mr. Hitchcock stated, when we informed him of this latest date for the depositions, that he for one would not consent to any further adjournments as the repeated preparation for them, only to have them adjourned shortly before their scheduled date, had become aggravating and burdensome.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS/ld
cc: Robert M. Hitchcock, Esq.
Harold J. Boreanaz, Esq.

March 29, 1971

Mr. Harold J. Boreanaz
Attorney at Law
736 Brisbane Building
Buffalo, New York 14203

Re: Less vs. Taber Instrument Corporation, et al

Dear Harold:

Will you kindly let us know what you learned from Mr. Himmelfarb about making arrangements for the taking of his examination before trial here. In our telephone conversation several weeks ago, we left it that you would contact him and let us know.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS:gs

Exhibit "B"

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

June 1, 1971

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
930 Walbridge Building
Buffalo, New York 14202

Attention: Charles J. McDonough, Esq.

Re: Less vs. Taber Instrument Corporation, et al

Gentlemen:

As you know from the notices filed in the above, the deposition of Teledyne, Inc., through Dr. Singleton and Mr. Kaufman, was originally scheduled for May 27, 1971, at this office. Subsequent to the service of the notice, you advised us that because of other commitments you would not be able to attend on the return date. As it turned out, that deposition was adjourned sine die as an accommodation to Teledyne's local counsel, who have indicated that they will move for a protective order.

The deposition of Ervin Himmelfarb, however, was noticed for June 7, 1971, and to date we have heard nothing from Mr. Boreanaz, counsel for Defendant Himmelfarb. Therefore, that deposition is still scheduled for June 7, 1971.

In view of the deadline set by Judge Curtin for the completion of discovery and if you cannot attend the depositions, we feel it would be in order to have someone from your firm attend in your behalf.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

JPH:gs
CC: Harold J. Boreanaz
Phillips, Lytle, Hitchcock, Blaine & Huber

Exhibit "C"

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

August 19, 1971

Mr. Harold J. Boreanaz
Attorney at Law
736 Brisbane Building
Buffalo, New York 14203

Re: Less vs. Taber Instrument Corporation, et al

Dear Mr. Boreanaz:

The taking of the deposition of your client, Mr. Himmelfarb, was duly noticed for June 7, 1971, but at your request, it was adjourned sine die to permit you to make a motion for a protective order, which we understood would be promptly filed.

We have been in touch with your office on several occasions requesting that you make your motion so that we can have a determination and get on with this discovery.

In view of the lapse of time which has occurred without any word from you, we hereby reschedule the taking of Mr. Himmelfarb's deposition, pursuant to said notice, at 10:00 A. M. on September 9, 1971, at our offices.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS:gs
CC: Phillips, Lytle, Hitchcock, Blaine & Huber
McDonough, Boasberg, McDonough & Deltz

Exhibit "D"

Ex. B. 9/9/71 c.s.

BEST COPY AVAILABLE

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

MEMORANDUM

TO : File

FROM : D. L. S.

DATE : January 18, 1974

RE : Less vs. Taber Instrument Corporation, et al

I called Ed Siemer this afternoon and told him that we had been informed by Hitchcock that the Trust Department of Marine had informed him that Mr. Siemer was going to try this case and not Mr. McDonough. I asked Siemer if he could confirm this and if he had been informed of the February 7, 1974, date for the status report conference.

Siemer said that he had reviewed the file and the depositions and the code of ethics and had reached the conclusion that McDonough definitely could not try the case. He has yet to submit his written opinion to that effect to the bank and, before doing so, wants to give McDonough the courtesy of conferring with him and advising him of his conclusion. He has been unable to get together with McDonough because of both of their schedules but he has arranged with McDonough to meet with him as soon as McDonough's present trial concludes.

I asked Siemer whether he had given any thought to the matter of consolidating the Raab and Less cases for trial and reminded him that Hitchcock [redacted] had no objection but that McDonough had expressed his objection at a pretrial conference. Siemer said that he had not thought about that question as yet but would do so as soon as he was officially in charge of the case. He said that he anticipates submitting his written opinion to the bank before the end of this month and filing a stipulation of change of counsel so that he will be counsel of record by the time of the February 7, 1974, conference. He also said that it might well turn out after he has reviewed the file that he would not oppose consolidation of the two cases but that he was not in a position at this time to give any opinion.

Siemer said that after reviewing the file and reading the transcripts it appeared that there was "a good deal of ugliness" that would have to be brought out in the event of trial and that it, therefore, appeared that all of the parties might be better served if the matter could be settled. I told him that I agreed. He said that once he gets into the case officially he thought he would like to sit down with us and review it and see if we could arrive at some reasonable basis of settlement. I told him that we would wait to hear from him on the score and that, as to the matter of consolidating the two cases, I would discuss it with my partners and possibly with the Judge and that, if we decided that a motion should be made in the meantime, we would advise him of it beforehand.

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

HEFFERNAN, SWEET & MURPHY
ATTORNEYS AT LAW
1202 MARINE TRUST BLDG.
BUFFALO, N.Y. 14203

JAMES P. HEFFERNAN
DAVID L. SWEET
EUGENE J. MURPHY
[redacted]

TELEPHONE 854-8960
AREA CODE 716

March 20, 1974

Hon. John T. Curtis
United States District Judge
United States Courthouse
64 Court Street
Buffalo, New York 14202

Re: Lees vs. Taber Instrument Corporation, et al
Civil Action No. 1967-182
Raab vs. Taber Instrument Corporation, et al
Civil Action No. 1967-190

Dear Judge Curtis:

The purpose of this letter is to report on the current status of the above actions and developments that have taken place since the status conference of February 7, 1974.

As you will recall, the conference on February 7, 1974, was attended by Arthur N. Sherwood of Mr. Hitchcock's office, Charles J. McDonough and ourselves. We informed you that we had been waiting for some time for word as to whether Mr. McDonough was to be replaced as trial counsel in these cases by Edward D. Siemer, and Mr. McDonough then announced that it had been decided that Mr. Siemer would replace him as counsel for the Estate of Ralph F. Taber but that Mr. McDonough intended to remain in the case as trial counsel for the defendants Taber Instrument Corporation, Hansen and Hildebrandt.

The question of possible consolidation of the two actions was then discussed and Mr. McDonough voiced his objection. You informed us that Harold Boreanaz, representing the defendant Himmelfarb in the Raab case, was engaged elsewhere but had left word with you that he would oppose consolidation.

Hon. John T. Curtin
March 20, 1974
Page 2

You then scheduled a further conference at 9:30 A. M. on February 22, 1974, stipulating that all counsel, including Mr. Siemer, were to be present. We were later informed by the Clerk of the Court that that conference had been canceled because of the death of Judge Henderson and that a new date would be set by the Court. As yet, that date has not been set.

On February 14, 1974, we served formal notice of motion for consolidation, returnable February 21, 1974, upon counsel of record, and upon Marine Midland Bank - Western as Co-Executor of the Estate of Ralph F. Taber, since no notice of substitution of Mr. Siemer had been received, and we also delivered a copy to Mr. Siemer. Mr. Siemer's firm thereafter served a notice of substitution in the Less case, and at their request, the motion was adjourned to February 28, 1974, and again to March 18, 1974, so that they could prepare. In the meantime, we loaned them pleadings and other documents in both cases as they requested.

By last Friday, March 15, 1974, we had received no answering affidavits from anyone and were unable to reach any of the opposing counsel, except for Mr. Hitchcock, to learn when their papers would be received and whether they intended to proceed with the motion on the 18th. The motion was therefore adjourned to March 25, 1974.

We have received today notice of substitution of Mr. Siemer's firm as attorneys for the Estate of Ralph F. Taber in the Raab case.

We are well aware that these cases are overdue for trial and wish to avoid any further preliminary skirmishes, such as litigation over the question of consolidation, which will further delay getting them set down for trial. We have, therefore, reviewed this question and frankly feel that it is not worth pursuing, in view of all of the circumstances. We recognize that the joining of the two cases for trial might produce additional and unnecessary

Hon. John T. Curtin
March 20, 1974
Page 3

complications in what are already sufficiently complex matters. In addition, we have now satisfied ourselves that the law will permit us to use in the Raab action, if necessary, the extensive pretrial depositions taken in the Less action, without consolidation or joint trial. Also, as opposing counsel have indicated during pretrial discussions held before Magistrate Maxwell, it appears likely that once the Less case has been resolved the Raab case can be settled rather readily.

Accordingly and for the above reasons, we now hereby withdraw our motion for consolidation, and ask that the Less case proceed to trial, with the Raab case to be tried at a later date.

We would like to turn to the matter of trial counsel. As the Court knows, Mr. McDonough will take the witness stand on various important and sensitive areas of the case, as will the undersigned and my partner, Mr. Murphy. It therefore appears that it would be improper under the canons of ethics for Mr. McDonough or any member of his firm, or for any member of our firm, to act as trial counsel in these cases. The Court indicated its own concern over this question at a pretrial conference. Despite the substitution of Mr. Siemer as counsel for the Estate of Ralph F. Taber, Mr. McDonough apparently intends to remain as trial counsel for other defendants. We feel that he should be disqualified and we hereby put on record our objection to his remaining as trial counsel. In accordance with the requirements of the canons of ethics on this question, we have arranged for outside trial counsel and feel that Mr. McDonough and/or his clients should do likewise. We respectfully request that the Court convene another meeting to resolve this question and to consider the fixing of a trial date in the Less case.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS:gs

CC: All Counsel of Record
BCC: David E. Montgomery, Esq.

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

Received
June 17, 1974

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff

-vs- Civil 1967-182

TABER INSTRUMENT CORP., et al.,

Defendants

JUNIA E. RAAB,

Plaintiff

-vs- Civil 1967-190

TABER INSTRUMENT CORP., et al.,

Defendants

At the June 3, 1974 meeting of attorneys with the court, it was agreed by all counsel that the trial in the case of Less v. Taber Instrument Corp., et al., Civil 1967-182, should proceed first and that the proceedings in the case of Junia E. Raab v. Taber Instrument Corp., et al., Civil 1967-190, be deferred until after the Less trial. Mr. McDonough reported to the court that Warren J. Hildebrandt was now represented by attorney Victor T. Fuzak. Mr. Fuzak could not be present at the meeting on the 3rd, but, with the consent of counsel, the court met with Mr. Fuzak on the 4th and he reported to the court that he is retained to represent Mr. Hildebrandt and would be ready for trial in mid-October, 1974.

During the June 3 meeting, Mr. McDonough reviewed the present corporate organization of Taber Instrument Corporation and expressed his opinion that because of the present state of affairs of the corporation, there were no stockholders or directors able to act to retain an attorney to represent the corporation. It was suggested that the court appoint a trustee to act in behalf of the corporation. The matter was adjourned until June 24, 1974 to permit counsel to submit a plan to the court so that representation for the corporation could be obtained.

Because attorneys Arnold Zelman, Ross Runfola and Victor Fuzak were only recently retained in this case, further leave was given to them to file motions or to take depositions. This work should be done not later than the 24th of June, 1974.

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

Plaintiff moved for an early trial date, suggesting September, 1974. After conferring with all counsel, including Mr. Fusak on June 4, it appears to the court that the earliest practical trial date is mid-October. Therefore, the court sets Tuesday, October 15, 1974 as the date for trial. At the June 24 meeting of counsel, the court will determine the pretrial steps necessary so that the October setting can be met. Before June 24 the attorney for the plaintiff shall meet with the Clerk to prepare an exhibit list setting forth all exhibits which he intends to use at the time of trial.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: June 14, 1974

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

Falk, Siemer, Glick, Tuppen & Maloney
Attorneys at Law
2200 ERIE COUNTY SAVINGS BANK BUILDING
BUFFALO, NEW YORK 14202
AREA CODE 716 852-6670

STANLEY G. FALK
EDWARD D. SIEMER
CHARLES D. TUPPEN, JR.
ALVIN M. GLICK
EDWARD J. CARLAND
KEVIN P. MALONEY
RICHARD C. MARCUS
JOHN R. HAMLETT
ALFRED S. REMSEN, JR.
SHELDON B. BENATOVICH
EDWIN H. WOLF
MICHAEL G. KELLY
DEANNE C. SIEMER

EUGENE L. FALK, 1867-1929
BRADLEY H. PHILLIPS, 1870-1938
FREDERIC R. TWELVETREES, 1892-1967

J. CLEMENT JOHNSTON
COUNSEL

September 30, 1974

Hon. John T. Curtin
United States District Court
Federal Building
Buffalo, New York 14202

Dear Judge Curtin:

Re: Less v. Taber Instrument Corp. et al.

On behalf of defendants Taber Instrument Corporation and the Estate of Ralph Taber, I would like to request that the trial date in the above-entitled matter be postponed for three weeks after the October 16, 1974 date now set, in order that the parties can pursue settlement negotiations.

Meetings and discussions among counsel are somewhat more protracted than in most cases because there are five counsel for defendants, all of whom have very heavy schedules, and there are three counsel for plaintiff, one located in Buffalo, one in New York City and one in Cambridge, Massachusetts. In addition, Mr. Boreanaz's client is located in Mexico, and one of our clients, Mrs. Taber, is currently located in Hawaii.

I am authorized to inform you that Messrs. Zelman, Boreanaz and Fuzak are agreeable to such a postponement. Mr. Hitchcock is agreeable to a postponement to October 29, 1974. Mr. Sweet has expressed, for the record, his opposition to such a postponement.

Sincerely,

Deanne C. Siemer

Deanne C. Siemer

DCS/vb
cc: Messrs. Zelman, Boreanaz,
Hitchcock, Fuzak and Sweet.

Affidavit of David L. Sweet In Opposition to Motion to Dismiss.

HEFFERNAN, SWEET & MURPHY
ATTORNEYS AT LAW
1202 MARINE TRUST BLDG.
BUFFALO, N. Y. 14203

JAMES P. HEFFERNAN
DAVID L. SWEET
EUGENE J. MURPHY

TELEPHONE 854-5960
AREA CODE 716

October 1st, 1974

Hon. John T. Curtin
U. S. Court House Bldg.
Buffalo, New York 14202

Re: Less vs. Taber Instrument Corp. et al .

Dear Judge Curtin :

We are writing this letter to oppose the three week adjournment requested by the attorneys for the Estate of Ralph Taber and Taber Instrument Corporation. We would, of course, not oppose an adjournment if there appeared to be a reasonable prospect of settlement, but there does not.

More than two months ago one of the defendants put forth a settlement figure of $500,000.00, and requested that the customary negotiating tactics be dispensed with, and that we respond with our bottom settlement figure . In response we reduced our demand of $1,250,000.00, which we had consistently maintained, to $800,000.00, which is the figure we genuinely feel the case should be settled at. This morning at a meeting of attorneys for all parties, defendants offered $492,500.00, which is $7,500.00 less than the figure put forth more than two months ago, which was previously rejected.

In light of the position taken today by the defendants, it would appear that settlement negotiations are at a stalemate.

The October 16th trial date was set last June and during recent settlement negotiations we have made it clear to defendants' counsel that we would oppose any adjournment of that date. Plaintiff is prepared for trial on October 16th and we request that no adjournment be granted.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By: David Sweet

DLS:K
cc:
Miss Deanne Siemer
Robert M. Hitchcock, Esq.
Harold J. Boreanaz, Esq.
Arnold N. Zelman, Esq.
Victor T. Fuzak, Esq.
David E. Montgomery, Esq.

Affidavit of James P. Heffernan in Opposition to Motion to Dismiss.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

-vs-

CIVIL No. 1967-190

TABER INSTRUMENT CORPORATION,
et al.,

Defendant

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

STATE OF NEW YORK :
SS.
COUNTY OF ERIE :

JAMES P. HEFFERNAN, being duly sworn deposes and says:

1. I am a member of the firm of Heffernan, Sweet and Murphy, attorneys for the plaintiff and am familiar with the proceedings in this action.

2. I have read the affidavit of my partner, David L. Sweet, sworn to May 14th, 1975, and fully concur with the statements set forth therein.

3. Both the Less and Raab cases involved very complex and difficult litigation. They had common questions of fact and law, having to do with the negotiations between Taber Instrument Corporation ("TIC") and Teledyne which led eventually to the acquisition of TIC by Teledyne, and the subsequent distribution of the Teledyne stock received to the

shareholders of TIC upon its liquidation.

4. The basic question common to both cases was whether there was a failure by the defendants to inform the plaintiffs of a material fact, namely, the existence of the Teledyne negotiations, at the time of the respective purchases of their TIC shares. The Less case was vastly the greater in value of the two cases, since it involved a claim worth potentially in excess of $1,400,000.00 as compared to about $60,000.00 in the Raab case, and therefore, throughout the proceedings it was always understood that the extensive discovery as to this issue, common to both cases, was being taken in the Less case. While there may not be, in the voluminous records in these proceedings, a formal stipulation to that effect, that was the nevertheless case, and it was perfectly obvious to all of us that it would have been ridiculous to repeat that extensive discovery again, simply to afford it a different caption.

5. In view of the complexity of the litigation, and the fact that neither plaintiff possessed knowledge of the crucial facts and circumstances of the Teledyne - TIC negotiations, it was necessary to take extensive discovery. The records indicate that such discovery was taken on 19 separate occasions, and that approximately 200 exhibits were marked, comprising a stack of documents about 1/2 foot high. Despite conscientious efforts on our part, it proved extremely difficult to get the discovery completed, for there was a considerable problem in

scheduling dates on which all the defendants' counsel, who were very active trial lawyers, were not otherwise engaged. I have read the examples attached to Mr. Sweet's affidavit and I have attached as exhibits to this affidavit some additional examples of this problem.

6. In view of the complexities involved and the problems encountered, I feel that the two cases were moved with reasonable and due diligence by the plaintiffs. It appears from our records that the plaintiffs indicated their readiness for trial, in both Less and Raab, at the August 1972 conference before Magistrate Maxwell, and that any subsequent delays in the reaching of the two cases for trial were due entirely to matters outside the plaintiffs' control.

In conclusion, I can see no valid basis for the defendants' motion to dismiss, and I respectfully request that it be denied.

Subscribed and sworn to before
me this 14th day of May, 1975.

Ruth A. Kolb

Commissioner of Deeds
In and for City of Buffalo
My Commission Expires 12/31/76

Affidavit of James P. Heffernan in Opposition to Motion to Dismiss.

March 27th, 1969

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
930 Walbridge Building
Buffalo, New York 14202

Attention : Mr. Charles J. McDonough

Re: Less vs. Taber, et al

Dear Sir :

Upon Judge Henderson's ruling as to the deposition of Mr. Less, we informed you that we would like to have the deposition taken as soon as possible and that we would make ourselves and Mr. Less available at your convenience. You indicated that you would contact us accordingly.

Having had no further word from you in the matter, we again inquire as to when you will be available for the taking of this deposition. We would like to complete it so that we can get on with other necessary discovery.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS:sb
CC: Mr. Robert Hitchcock
Mr. Harold Boreanaz

May 12th, 1969

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
930 Walbridge Building
Buffalo, New York 14202

Attention : Mr. Charles McDonough

Re: Less vs. Taber, et al

Dear Charles :

We are most anxious that examination before trial of Mr. Less be continued as promptly as possible. We will produce Mr. Less on four or five days notice and are willing to have the examination take place on Saturdays or evenings provided reporters are available.

May we hear from you at your earliest convenience.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

JPH:sb

Affidavit of James P. Heffernan in Opposition to Motion to Dismiss.

MEMO

******

FROM : DLS

DATE : April 9th, 1970

RE : Less vs. Taber

The deposition of Mr. McDonough scheduled for April 9th, 1970 was adjourned at Mr. McDonough's request because according to his secretary, he was otherwise engaged.

Exhibit "T"

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER

FORMERLY KENEFICK, LETCHWORTH, BALDY, PHILLIPS & EMBLIDGE

ATTORNEYS AT LAW

MARINE TRUST BUILDING

BUFFALO, N.Y. 14203

WILLIAM E. LYTLE
CHARLES G. BLAINE
ARTHUR J. PIER
SOLON J. STONE
EDWARD L. ROBINSON
WILLIAM A. BAIN, JR.
JOHN E. McCORMICK
WILLIAM L. RIETH
FRANK J. LASKI
DAVID K. FLOYD
IRVING D. BROTT, JR.
JOHN F. DONOVAN
EDWARD H. GRIFFITH, JR.
HEINO H. PRAHL
ROBERT M. HITCHCOCK
DANIEL G. YORKEY
FRANCIS V. COLE
ALEXANDER C. CORDES
PAUL V. JOLLEY
JOHN K. KIMBALL
DONALD F. RUNYAN
WILLIAM J. O'CONNOR, JR.
ROBERT M. SPAULDING
RICHARD G. BIRMINGHAM
CHARLES RYAN DESMOND
PETER B. SCHREIER
GERARD R. HAAS
WALDRON S. HAYES, JR.
FREDERICK G. ATTEA

GEORGE F. PHILLIPS
ALFRED A. BUERGER
OF COUNSEL

JOHN F. HUBER, JR.
1907-1969

TELEPHONE
852-6100
AREA CODE 716

April 27, 1970

Heffernan, Sweet & Murphy
1202 Marine Trust Building
Buffalo, New York 14203

Attention: David L. Sweet, Esq.

Re: Less v. D'Angelo (Taber)

Dear Dave:

Receipt is acknowledged of a copy of your April 24 letter to Mr. McDonough.

I will be unable to participate in a deposition on May 14. Judge Marshall has ordered the selection of a jury on May 11 (Central Steel Products v. Pittsburgh Testing). I represent one of the defendants and anticipate that the trial will last into the second week.

Very cordially yours,

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER

By Bob
Robert M. Hitchcock

AAst

cc: Harold J. Boreanaz, Esq.
Charles J. McDonough, Esq.

Exhibit D

Affidavit of James P. Heffernan in Opposition
to Motion to Dismiss.

April 27th, 1970

Mr. Charles J. McDonough
Attorney at Law
930 Walbridge Building
Buffalo, New York 14203

Re: Less vs. Taber

Dear Sir :

This will confirm today's telephone conversation with you which we rescheduled your deposition for Friday, May 29th, 1970 at 10:00 A.M., because of Mr. Hitchcock's conflict on May 14th,.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

BY :

DLS:sg
CC: Mr. Robert Hitchcock
Mr. Harold Boreanaz

Exhibit "E"

Affidavit of James P. Heffernan in Opposition to Motion to Dismiss.

April 24th, 1970

Mr. Charles J. McDonough
930 Walbridge Building
Buffalo, New York 14202

Re: Less vs. Taber

Dear Mr. McDonough :

This will confirm today's telephone conversation with you in which we scheduled the continuation of your deposition for May 14th, 1970 at 10 A.M.

We are sending a copy of this letter to Messrs. Hitchcock and Boreanaz and trust that they will advise us promptly if that date is not available for them.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS:sg
CC: Mr. Harold Boreanaz
Mr. Robert Hitchcock

Affidavit of James P. Heffernan in Opposition to Motion to Dismiss.

June 2nd, 1970

Mr. Charles J. McDonough
Attorney at Law
930 Walbridge Building
Buffalo, New York 14203

Re: Less vs. Taber Instrument Corporation, et al
Raab vs. Taber Instrument Corporation, et al

Dear Sir :

This will confirm that your examinations before trial in the above cases which were scheduled for May 29th, 1970, were postponed at the request of your office on May 28th, 1970.

As we informed your secretary, we wish to take these depositions as soon as possible and we are awaiting word from you as to a new date.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS/ld

cc: Mr. Robert Hitchcock
Mr. Harold Boreanaz

Exhibit "B"

Affidavit of James P. Heffernan in Opposition to Motion to Dismiss.

HEFFERNAN, SWEET & MURPHY
ATTORNEYS AT LAW
1202 MARINE TRUST BLDG.
BUFFALO, N.Y. 14203

JAMES P. HEFFERNAN
DAVID L. SWEET
EUGENE J. MURPHY

TELEPHONE 854-5960
AREA CODE 716

June 12th,1970

Hon. John T. Curtin
United States District Court
U.S. Court House
Buffalo, New York

Re: RAAB vs. TABER INSTRUMENT CORP., et al
Civil No. 1967-190

Dear Judge Curtin :

This case appeared on the dismissal calendar call on March 13th,1970. We reported to you briefly on the status of the case and you instructed us to file a written report of progress in the case on June 12th,1970.

RAAB vs. TABER INSTRUMENT CORP. is a companion case to LESS vs. TABER INSTRUMENT CORP. Both plaintiffs sue for rescission of the sale of their stock in Taber Instrument Corporation, claiming violations of S.E.C. Rule 10b-5 by reason of failure of the defendants to disclose pending negotiations for the acquisition of Taber Instrument Corporation by Teledyne Corp. at a much higher price than they were paid for their stock.

With respect to the evidence common to the claims of both the plaintiffs, i.e., the circumstances surrounding the negotiations for the acquisition of Taber Instrument Corporation by Teledyne, we have taken extensive discovery by way of examination before trial of Taber Instrument Corporation and its officers and directors pursuant to notices which we issued in the LESS action.

With respect to the negotiations for the purchase of the stock of the plaintiff RAAB, and the affirmative defenses interposed as to his claim, we served a notice to

take the examination before trial of Mr. Charles McDonough who, we are informed, conducted said negotiations on behalf of the defendants, and subpoenaed Mr. McDonough to attend. This examination was scheduled for May 29th, 1970, which was the adjourned date for the completion of his examination before trial in the Less case, which had been adjourned from time to time because of Mr. McDonough's engagement in other matters. Shorly before May 29th, 1970, these examinations were postponed at Mr. McDonough's request because of his engagement in a trial in Supreme Court, Erie County. They were rescheduled for Monday, July 13th, 1970, which Mr. McDonough informed us, was the earliest that his other commitments would permit.

The Raab suit is being actively and diligently prosecuted, and we will have both it and the Less suit brought on for trial at the earliest possible date.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By :

JPH:ld

Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff

vs. CIVIL No.1967-190

TABER INSTRUMENT CORPORATION,
et al.,

Defendants

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

FACTS

The facts pertinent to this motion are as set forth at length in the affidavits of David L. Sweet and James P. Heffernan, sworn to May 14th, 1975, and we stand by them. However, the Statement of Facts given in the defendants' memorandum contains such serious misstatements and inaccuracies that it is necessary to respond to some of them individually in order to set the record straight.

At the top of page 5 they indicate that a single deposition of defendants' counsel, Mr. McDonough, was taken May 29th, 1970, was most abbreviated, and covered only 27 pages of transcript. The truth is that three depositions were taken of Mr. McDonough in 1970. Two were taken on

July 13th, 1970; the first on that date was taken in the Less case and covered 78 pages of transcript, and was concerned with matters pertinent not only to the purchase of the Less shares, but also dealings between Mr. McDonough and Teledyne's counsel, Mr. Kaufman, with respect to the proposed acquisition. At that examination Mr. McDonough produced voluminous unsegregated documents and papers, and by stipulation of all counsel it was agreed that he would make those documents available for inspection after the conclusion of that examination, and that a further examination of him would be held after counsel had had the opportunity to go through said documents.

The other examination of Mr. McDonough on July 13, 1970, was taken in the Raab case, took 27 pages of transcript, and covered in detail the negotiations conducted by Mr. McDonough for the purchase of the Raab shares.

The resumption of Mr. McDonough's examination took place on October 1, 1970, and was devoted almost entirely to the Teledyne-TIC negotiations and ultimate acquisition, matters common to both the Less and Raab actions. It consisted of 81 pages of transcript and the marking as exhibits of some 39 documents involved in the TIC-Teledyne transaction. In addition to those matters necessarily common to the claims of both Less and Raab, the examination covered a matter specifically referring to plaintiff, Raab, which was a draft submitted to Mr. McDonough by Teledyne's counsel, Mr. Kaufman, of a proposed escrow agreement against possible liability arising out of the purchase of 14,700 shares, consisting of 14,100 shares which had been purchased by TIC from Less and 600 shares which had been purchased by TIC from Raab.

The defendants have deliberately ignored those examinations which were concerned with matters common to both the Less and Raab actions. They have also failed to mention the fact that on October 1, 1970, the defendants took the examination of plaintiff Raab, and only after our prodding of the defendants to get the taking of that deposition accomplished, as the attached memorandum and letter to Mr. McDonough show.

In response to the statement at the top of page 7 of defendants' memorandum, alleging inaction on the part of the plaintiffs following substitution of counsel, as we have pointed out in our affidavits, the further progress of the actions was interrupted by indecision or inaction on the part of the defendants in appointing substitute counsel, and in their delay in preparing for trial after the substitution of counsel.

At page 21, first line, defendants state that we sought to take the depositions of Dr. Singleton and Mr. Kaufman in 1968. Actually, our effort to take their depositions here in this jurisdiction was made in early 1971, as pointed out in our affidavits.

The defendants' second statement in the first paragraph of page 21, that all necessary discovery in this case was completed no later than August 1967, is incredible on its face, since, as we mentioned, it wilfully ignores the extensive discovery taken of matters common to both actions, and the discovery taken by the defendants in 1970 and 1972.

L A W

Dismissal of a suit for lack of prosecution is a harsh remedy which should be resorted to only in extreme cases.

See Meeker vs. Rizley, 324 F.2d 269 (10th Cir. 1963), Syracuse Broadcasting Corp. vs. Newhouse, 271 F.2d

910 (2nd Cir. 1959) , Lyford vs. Carter, ~~294~~ 274 F.2d, 815 (2nd Cir. 1960).

The fact that a long period of time has elapsed since suit is not a basis for dismissal, where delays are occasioned by matters not attributable to the plaintiff, such as extreme complexity of the litigation, delays on the part of the defendants, or other matters outside plaintiff's control.

See: Bendix Aviation Corp. vs. Glass, 176 Fed. Supp. 374; Tinnerman Products Inc. vs. Garrett, 22 F.R.D. 56; Rankin vs. Shayne Bros. Inc. 280 F. 2d 55 ; International Harvester Co. vs. Rockwell Spring & Axle Co., 339 Fed. 2d, 949 1964.

Moreover, and in any event, defendants' motion is untimely. U. S. vs. Myers, 38 F.R.D. 194

Each case must be judged on it own circumstances. The cases relied upon by the defendants all involve situations of long, unexcused delay on the part of the plaintiff, of such nature and extent as to lull a defendant into assuming that the plaintiff did not seriously intend to bring the case on for trial, or serious violations of or noncompliance with Court calendar rules or orders. Such is not the case here.

Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss.

Dismissal of this action under Rule 41(b) F.R.C.P. is clearly not warranted here, for the reasons set forth in detail in our affidavits. Therefore, defendants' motion should be denied.

Respectfully submitted

HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff
Office and P.O. Address
1202 Marine Trust Building
237 Main Street
Buffalo, New York 14203

Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss.

MEMO

TO : D. L. SWEET
E. J. MURPHY
FROM : J. P. HEFFERNAN

Re: RAAB vs. TABER, et al

Mr. Raab called me today and said that there is a possibility that he might take a position on the west coast permanently and if it comes about he will be leaving here within the next six to eight weeks.

I called Charlie McDonough and told him that if he wanted to take Raab's deposition, he should do it promptly.

JPH

August 20th, 1970

September 22, 1970

Charles McDonough, Esq.
930 Walbridge Building
Buffalo, New York 14202

Re: Less vs. Taber, et al
Raab vs. Taber, et al

Dear Mr. McDonough:

This will confirm today's conversation with you in which we rescheduled for Thursday, October 1, 1970, at 10:00 A. M., the taking of Mr. Raab's deposition and the completion of your examination.

As we have advised you earlier, Mr. Raab will very shortly be moving to the West Coast permanently and we cannot assure his presence here for the taking of his examination beyond next week.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS:gs
CC: Robert M. Hitchcock, Esq.
Harold J. Boreanaz, Esq.

60

Reply Memorandum of Defendants Taber Instrument Corporation and Estate of Ralph F. Taber.

In the
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff,

v. Civ. No. 1967-190

TABER INSTRUMENT CORP., et al.,
Defendants.

REPLY MEMORANDUM OF DEFENDANTS TABER INSTRUMENT CORP. AND THE ESTATE OF RALPH F. TABER IN SUPPORT OF MOTION TO DISMISS

Plaintiff has offered both legal and factual defenses against defendants' Motion to Dismiss. Both defenses are without merit.

A. Legal Defenses

Plaintiff does not challenge any of the criteria for deciding a motion to dismiss under Rule 41(b), F.R.C.P., for failure to prosecute that are set out in Defendant's Memorandum in Support of the Motion to Dismiss, and does not challenge any of the cases cited as support for those criteria. Instead, plaintiff attempts to draw out of the case law additional criteria that should be met. However, six of the eight cases cited are inapposite at best and the remaining two cases are trial court opinions that are outweighed by substantial authority to the contrary. Plaintiff's efforts to find criteria that defendants have not met is unsuccessful.

One of the eight cases is distinguishable because it was dismissed for failure to obey a court order, not for failure to prosecute. Syracuse Broadcasting Corp. v. Newhouse, 271 F. 2d 910 (2d Cir. 1959). Although failure to obey a court order is one of the grounds for dismissal under Rule 41(b) the applicable criteria are different.

A second case is distinguishable because it was not decided under Rule 41(b) at all. In Meeker v. Rizley, 324 F. 2d 269 (10th Cir. 1963), a default judgment was entered. That judgment was set aside because the three-day notice requirement imposed by Rule 55(b)(2) had not been met. In dictum, the court pointed out that a dismissal under Rule 41(b), also theoretically available, would be harsh because the case had been pending only four months, there had been only one failure on the part of the plaintiff, and the plaintiff was not represented by counsel. Further, since plaintiff had failed to appear for a scheduled pre-trial conference as ordered by the court, the dictum arguably goes to dismissal for failure to obey a court order, not for failure to prosecute.

Two other cases are distinguishable because of highly unusual fact situations. In International Harvester Co. v. Rockwell Spring & Axle Co., 339 F. 2d 949 (7th Cir. 1964), a six year delay was caused by the pendency of a case in the Court of Claims against one of the parties that all parties agreed could moot all of the issues before the court. The court dismissed the case under Rule 41(b) for failure to prosecute and specifically provided that the dismissal was without prejudice. Plaintiff appealed because of possible statute of limitations problems. The Court of Appeals reversed, holding that awaiting a decision that could moot all of the issues in the case did not amount to a failure to prosecute. In Rankin v. Shayne Bros. Inc., 280 F. 2d 55 (D.C.Cir.1960), a motion for a directed verdict for defendant was granted at the conclusion of defendant's case. The appellate court reversed and remanded for a new trial. The remand order, granted in 1956, was not acted upon by plaintiff for about three years, and in 1959, defendant moved under Rule 41(b) to dismiss for failure to prosecute. The motion was granted by the trial court and the appellate court reversed, finding that the plaintiff's attorney had become ill in 1956 and discontinued his practice; the plaintiff had been so ill during the 1956-1959 period that he could not have participated in a trial; and the defendant had not been harmed by the delay because all of the testimony from the prior trial was available. Plaintiff can make no claim that either of those fact situations is even close to his case. Decision of the Less case either way would not have mooted a single issue in the Raab case, much less the whole case; and neither plaintiff nor his attorney has been disabled by illness for the past seven years.

The fifth case, Lyford v. Carter, 274 F. 2d 815 (2d Cir. 1960), is a per curiam opinion that was apparently decided on a ground applicable only to defendants who are not served with process promptly. That precedent is not relevant here.

Two cases are cited by plaintiff for the proposition that delays by defendant in moving forward to trial are a defense to a motion to dismiss for failure to prosecute. The first such case can be disposed of summarily. Plaintiff cited a 1959 opinion in Bendix Aviation Corp. v. Glass, 176 F. Supp. 374 (E.D. Pa. 1959),without also citing a later opinion in the same case dismissing the action for failure to prosecute and pointing out that the defendant's inaction is irrelevant because the responsibility for bringing the case on for trial lies squarely with the plaintiff. Bendix Aviation Corp. v. Glass, 32 F.R.D. 375, 378 (E.D. Pa. 1962), aff'd. 314 F.2d 944 (3d. Cir.), cert.

denied, 375 U.S. 817 (1963). The second such case, Tinnerman Products, Inc. v. George K. Garrett Co., 22 F.R.D. 56 (E.D. Pa. 1958), involved a counterclaim by the defendant that the court found to be "an entirely separate and distinct lawsuit." Id. at 57. The court found that although the plaintiff had failed to prosecute his claim, the defendant had also failed to prosecute his counterclaim. Since both had failed to prosecute, the defendant's motion to dismiss was denied. It would seem that the better remedy would have been to grant the defendant's motion to dismiss the plaintiff's claim, and to permit the plaintiff to make the same motion against the defendant's counterclaim. However, to the extent that this case holds the defendant has any responsibility to move a case on to trial it is distinguishable on the facts since this case involved a counterclaim and it is outweighed by substantial authority from the same jurisdiction to the contrary. S & K Airport Drive-In v. Paramount Film Dist. Corp., 58 F.R.D. 4, 7 (E.D. Pa.), aff'd. 491 F. 2d 751 (3d Cir. 1973); Bendix Aviation Corp. v. Glass, 32 F.R.D. 375, 378 (E.D. Pa. 1962), aff'd. 314 F. 2d 944 (3d Cir.), cert.denied, 375 U.S. 817 (1963); see also Hicks v. Bekins Moving & Storage Co., 115 F.2d 406,409 (9th Cir. 1940).

Plaintiff also suggests that defendants' motion to dismiss was not timely made and cites a single case, *United States v. Myers*, 38 F.R.D. 194 (N.D. Cal. 1964), as support for that proposition. In *Myers* there was a complaint filed in 1958, and answer filed in 1959, and apparently no further action until a request for admissions was filed about two and one-half years later in 1962. The defendant responded to that request, and shortly thereafter the plaintiff moved for summary judgment. The defendant countered with a motion to dismiss for failure to prosecute and the court held that "plaintiff has not so delayed prosecution as to require dismissal of the action". *Id.*at 197. The court noted that if "a plaintiff is presently prosecuting his claim with reasonable diligence, the action cannot be dismissed because at some earlier time the plaintiff failed to act with diligence." That corollary should not be controlling in the case before this court for two reasons: first, it is not founded on any holding that is on point; and second, there is substantial authority to the contrary. The only authority cited in *Myers* to support this proposition is *Rollins v. United States*, 286 F.2d 761 (9th Cir. 1961). That case was not decided under Rule 41(b). It involved a dismissal for lack of jurisdiction. The complaint was filed in 1955 but was not served.

In 1958 the clerk put the case on the dismissal calendar and in due course a hearing was held. At that hearing the court ordered that service be completed, which it was, and the case was removed from the dismissal calendar. Subsequently the defendant challenged that ruling on jurisdiction grounds. The trial court dismissed and the appellate court reversed. In dictum, the appellate court pointed out that it might have been within the discretion of the trial court to dismiss for failure to prosecute at the time of the first hearing on the dismissal calendar. However, after obtaining service on the defendant, the plaintiff had proceeded diligently and as the case stood before the appellate court there were then no grounds for a dismissal for failure to prosecute. The holding was limited to reversal of the dismissal for lack of jurisdiction, which was the only issue before the court.

The dictum should not be followed by this court because the weight of the relevant authority is to the contrary. E.g., Sheaffer v. Warehouse Employees Union, 408 F. 2d 204 (D.C. Cir.), cert. denied, 395 U.S. 934 (1969) (holding that activity shortly before trial did not salvage previous failure to prosecute and the motion to dismiss was granted four days before trial).

Plaintiff's failure to establish any new criteria by which the motion to dismiss should be decided leaves only factual defenses in an effort to demonstrate that the criteria set out by defendants have somehow not been met. That effort is also unsuccessful.

B. Factual defenses

The Affidavits of Messrs. Sweet and Heffernan offered in opposition to the Motion to Dismiss illustrate graphically the disadvantage to defendants caused by plaintiff's delay. They offer testimony as to what Mr. McDonough, as former counsel for defendants, knew, understood, and did.*/ They base their defense to the Motion to Dismiss on what are, with one exception, unsubstantiated allegations, and can do that with impunity because Mr. McDonough cannot respond.

But more important, the Affidavits, in attempting to create a scenario of diligent activity on the part of the plaintiff, testify to a great many facts that are entirely irrelevant. Plaintiff's responsibility is to prosecute his case. He can meet that responsibility only by taking actions to bring the case on for trial. One looks in vain through the lengthy recitations of phone calls made, memoranda and letters written, and documents loaned to defendants to find anything that plaindid did to bring the case on to trial. From their own recitation of the facts, plaintiff's counsel appeared before this court eight times on various motions and four times in pretrial meetings prior to April, 1974, and never asked for a trial date. They never inquired of anyone (until now) whether a trial date had been or would be set. Moreover, they never asked for a cut-off date of any sort to bring the case to trial more promptly; they never pursued requests for admissions or stipulations that might have moved the case closer to trial. By their own account, they sat back and waited, dutifully appearing whenever the court scheduled a pre-trial conference. However, the plaintiff has an affirmative responsibility to prosecute his case. He must take affirmative action to bring the case on to trial in order to have any defense against a Motion to Dismiss under Rule 41(b). Plaintiff has failed to take any affirmative step and has no defense.

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*/ Affidavit of D. Sweet at pp. 4,6,7; Affidavit of J. Heffernan at pp. 2-3.

Plaintiff now seeks to overcome his lack of affirmative action by offering a series of excuses: (1) the case is "complex and extensive;" (2) there were delays and adjournments in the plaintiff's depositions; and (3) the defendants caused other delays. However, none of these excuses will survive any serious scrutiny.

1. This case is neither complex nor extensive.

Plaintiff seeks to slip behind a smokescreen labelled "complex securities case". However, this is, in reality, a remarkably simple case. Plaintiff must prove only four things: (1) that there were negotiations or an agreement in principal between Taber Instrument Corporation and Teledyne, Inc. prior to the time plaintiff agreed to sell his stock; (2) that those facts, if they existed, were not disclosed to plaintiff by defendants or anyone else; (3) that those facts were material to plaintiff's decision to sell; and (4) that plaintiff was damaged thereby. There is nothing complex or extensive about the proof with respect to any of those elements of the cause of action. There were only five persons involved in the transactions between Taber Instrument Corp. and Teledyne -- Messrs. Taber, McDonough, D'Angelo, Singleton and Kaufman. Similarly, there were only four persons involved in the transaction between Taber Instrument Corporation and the plaintiff -- Messrs. Taber, McDonough, Ness and the plaintiff himself. By November, 1967, plaintiff had taken the depositions of Messrs. Taber and D'Angelo.

Plaintiff never took the depositions of Messrs. Singleton, Kaufman and Ness. This aspect of the supposed "complexity" seems insubstantial.

Plaintiff seeks to make much of the number of documents,[*/] but does not point out that many of the documents marked as exhibits during the depositions are irrelevant to any of the issues; and nearly all of the documents had been available to the defendants since November 1967 by which time they had taken the depositions of all of the defendants and Teledyne. This aspect of the supposed complexity also seems insubstantial.

It should be noted here that present counsel for defendants Hildebrandt and Manasen did not enter the case until mid-May, 1974, and were ready to go to trial by October, 1974.[**/]

[*/] Plaintiff marked only 158 documents as exhibits in the depositions in the Less case, and only seven documents as exhibits in its single deposition in the Raab case. Defendants marked 52 exhibits in the Less case depositions, and two documents in their single deposition in the Raab case.

[**/] Notice of Retainer and Appearance (Mr. Fuzak for Mr. Hildebrandt) dated May 13, 1974; Notice of Retainer and Appearance (Mr. Zelman for Mr. Manasen) dated May 20, 1974

2. The delays and adjournments in plaintiff's depositions are of no consequence because they were either caused by plaintiff or readily remediable by plaintiff.

Plaintiff's laments about the depositions it sought to conduct seem to fall into three categories: (a) there were delays in scheduling the deposition attributable to defendants; (b) there were adjournments in the depositions because defendants' files were not neatly organized for plaintiff's litigation purposes; and (c) there were attempts to take depositions that were foiled by defendants and thereafter became too costly. These excuses are without substance or support in the record.

Plaintiff complains that its depositions were frequently delayed because of Mr. McDonough's unavailability. Several documents are offered in support of that contention, all of which are related to an attempt to set a date for Mr. McDonough's deposition. A review of Mr. McDonough's files and notes shows no other instance of delay caused by Mr. McDonough with respect to other depositions, and had Mr. McDonough been able to reply, no doubt he could have made this point more forcefully.*/ However, this aspect of the debate is irrelevant anyway because plaintiff had at all times the means to compel Mr. McDonough to attend and need not have tolerated any delays.

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*/ Supplemental Affidavit of D. Siemer ¶. 2.

Plaintiff further complains that depositions were adjourned from time to time so that plaintiff could examine defendants' documents in a more leisurely fashion. There were, in fact, a number of such adjournments. The Hildebrandt deposition was adjourned for about 60 days in 1967. Plaintiff marked two exhibits, the Taber Instrument Corporation stock record books, at the first session of the Hildebrandt deposition and no exhibits at the second session. The D'Angelo deposition was adjourned for about 60 days in late 1967. Plaintiff marked 15 exhibits at the first session of the D'Angelo deposition and no exhibits at the second session. The Bartlo deposition was adjourned for less than 30 days in 1969. That adjournment was requested by counsel for plaintiff for the purpose of seeking a waiver of the attorney-client privilege.*/ There is no indication that these adjournments were related to plaintiff's examination of any files of defendants. The McDonough deposition taken in the Less case was adjourned twice.**/

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*/ Bartlo deposition, pp. 989-990.

**/ There was also a deposition of Mr. McDonough in the *Raab* case but it was completed in a single session and was not adjourned.

The first session was held on January 29, 1970 at which four exhibits were marked. There was no "massive and largely unsegregated file" turned over to plaintiff for examination in the interim, as Mr. Sweet's Affidavit suggests (p.6), although Mr. McDonough did agree to produce additional documents at the next session. */ The second session was held over five months later. However, if plaintiff had wished to move with more dispatch, Mr. McDonough could have been compelled to appear at any reasonable time. At this session, 20 documents were marked as exhibits. At the conclusion of that deposition session, Mr. Sweet requested an adjournment noting for the record:

> "Well, we have a few more questions that we would like to defer, Mr. McDonough, until we have gone through these documents that you have presented here today ... ." */

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*/ See McDonough deposition (January 27, 1970) p. 49 lines 16-21; p. 52, lines 9-11; and McDonough deposition (July 13, 1970) p. 4, lines 8-12.

**/ McDonough deposition (July 13, 1970) p. 78, lines 12-15.

It took plaintiff's counsel, by their version of the facts, nearly three months to analyze this mass of 20 documents, and the third session of the McDonough deposition was held on October 1, 1970. None of these adjournments can excuse plaintiff from its failure to prosecute this action. If anything, these adjournments highlight that failure.

Plaintiff's further excuse in this category is that it sought to take the depositions of Messrs. Singleton, Kaufman and Himmelfarb in this jurisdiction. Counsel for those persons objected and the court ruled that plaintiff would have to take the depositions of Messrs. Singleton and Kaufman in California and would have to reimburse Mr. Himmelfarb for his expenses in coming to New York for a deposition. Plaintiff now takes the position that these depositions were abandoned because of the prohibitive cost. However there are two very interesting omissions in the Affidavits of Messrs. Sweet and Heffernan in these regards. First, there is no explanation of why plaintiff delayed almost exactly four years before ever seeking to depose these gentlemen. Mr. Himmelfarb, as a defendant, was a logical candidate for a deposition from the date the complaint was filed. Messrs. Singleton and Kaufman were known candidates for depositions from early August, 1967 when plaintiff completed the depositions of Ralph Taber, if not before. Second, there is no elaboration of the "enormous cost" that plaintiff would have had to bear in taking these depositions.[*/] The current round-trip plane fare from Buffalo to Los Angeles, where Messrs. Singleton and Kaufman have their offices, is $322.00. The current round-trip plane fare from Mexico City, a point of departure from which Mr. Himmelfarb might travel, to Buffalo is $344.00.[**/] None of those depositions would have taken more than one day so that the ancillary expenses incurred would be minimal. Further, under plaintiff's version of the arrangements, these costs would have been split with the Less case since all of these depositions were being taken in both cases.[***/]

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*/ See Affidavit of D. Sweet, pp. 7-8. Mr. Sweet points out that he would have had to bear the expenses of all the defendants' attorneys attending the deposition in California. Rule 30(g)(2) requires such reimbursement only in the event that a subpoena is not served and the witness does not attend.

**/ See Supplemental Affidavit of D. Siemer ¶.3.

***/ Affidavit of D. Sweet, p. 4; Affidavit of J. Heffernan, p.2. Note that plaintiff in the Raab case was evidently willing and able to meet the cost of attorneys fees and stenographic transcription for taking these depositions in Buffalo, therefore those costs do not affect the decision not to pursue these depositions.

It is unlikely that the total cost of $400.00 or less for taking these depositions was an "enormous cost" to plaintiff in prosecuting this case. It is much more likely that plaintiff's counsel just never got around to doing it, and therefore, plaintiff should not now be permitted to claim this intermittent activity during 1971 as a defense to the Motion to Dismiss.

3. There were no delays in bringing this case to trial caused by any defendant.

Plaintiff points out that defendants did not complete their discovery until after plaintiff's announcement in August, 1972 that its discovery was completed. In less than 90 days, defendants had completed their remaining discovery. It appears that defendants were at all times ready to complete their discovery, and had so informed the court on several occasions.[*/] Had the plaintiff announced that its discovery was completed in November, 1967 after all of the defendants and Teledyne had been deposed,

x

[*/] *Eg*. Order of the court dated April 6, 1971 presumably defendants would have completed their discovery within 90 days and the case would have been ready for trial. The 90-day period during which defendants completed their discovery would hardly seem to assist in plaintiff's defense against the Motion to Dismiss.

Plaintiff then points to an alleged delay from July, 1973, when the Taber will was probated, to February, 1974, when new counsel for the Estate of Ralph Taber was appointed.[*/] The flaw in this aspect of plaintiff's defense is that there is no time at which the Estate was not represented by counsel and plaintiff could have requested a trial date at any time in order to encourage the executors of the Estate to move with more expedition. Substitution of counsel for a defendant is of no concern to plaintiff as far as his responsibility to prosecute his case is concerned.

CONCLUSION

Plaintiff's excuses for its inaction over the more than seven years that this case has been pending before this court are unsupported and indeed controverted by the record.

[*/] *See* Notice and Consent to Change of Attorney (Mr. Siemer for Mr. McDonough) dated February 21, 1974.

Reply Memorandum of Defendants Taber Instrument Corporation and Estate of Ralph F. Taber.

The injury to defendants is not seriously contested by plaintiff and is of great significance to the ability of defendants to defend this action at all. Defendants respectfully request that the Motion to Dismiss be granted.

Respectfully submitted,

Deanne C. Siemer

Deanne C. Siemer

Counsel for the Taber
Instrument Corporation and
the Estate of Ralph F.Taber.

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Supplemental Affidavit of Deanne C. Siemer in Support of Motion to Dismiss.

In the
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff,

v. Civ. No. 1967-190

TABER INSTRUMENT CORP., et al.,
Defendants.

STATE OF NEW YORK)
) ss:
COUNTY OF ERIE)

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

DEANNE C. SIEMER, being first duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York and I represent the defendants Taber Instrument Corporation and the Estate of Ralph F. Taber in the above-entitled matter. I have previously submitted an affidavit in support of the defendants' Motion to Dismiss, now pending before this court, and the affidavit that I make on this date is a supplemental affidavit also addressed to this Motion.

Supplemental Affidavit of Deanne C. Siemer in Support of Motion to Dismiss.

2. After Mr. McDonough's death, his office turned over to me what was represented to be all of Mr. McDonough's notes and correspondence in the cases entitled Less v. Taber Instrument Corp. and Raab v. Taber Instrument Corp. I have read and catalogued all of these materials. I have not found in those notes or correspondence any support (other than that evidenced by exhibits to the Sweet and Heffernan affidavits) for:

a) the statement by Mr. Heffernan that: it was always understood that the extensive discovery as to this issue, common to both cases, was being taken in the Less case." Affidavit of J. Heffernan, p.4.

b) the statement by Mr. Heffernan that: "it proved extremely difficult to get the discovery completed, for there was a considerable problem in scheduling dates on which all the defendants' counsel, who were very active trial lawyers, were not otherwise engaged." Affidavit of J. Heffernan,p.5.

c) the statement by Mr. Sweet that: "counsel for all parties in both cases, throughout the entire pre-trial proceedings, treated Less as the "lead" case and knew that the basic discovery concerned with the Teledyne-TIC transaction and the liquidation of TIC was taking place in the Less case. Affidavit of D. Sweet at p.4.

d) the statement by Mr. Sweet that: "On several occasions the examinations conducted by us had to be adjourned so that we could go through the massive and largely unsegregated files produced by Mr. McDonough and his clients and sort out the many documents and records pertinent to the inquiry." Affidavit of D. Sweet, at p. 6

e) the statement by Mr. Sweet that: "Time after time we would schedule an examination and prepare for it, only to have Mr. McDonough's office notify us at the last minute that he was otherwise engaged and could not attend." Affidavit of D. Sweet at p. 6.

As Mr. McDonough is not available, defendants have no other source of information to rebut these statements and are substantially prejudiced thereby.

3. Upon information and belief, the current round-trip air fare from Buffalo, New York to Los Angeles, California, is $332.00. The current round-trip air fare from Buffalo, New York to Mexico City, Mexico is $344.00. These fares may have been substantially lower in the years 1968, 1969, 1970, 1971 and 1972. The information upon which this belief is based was obtained through a telephone inquiry to the Buffalo, New York office of American Airlines, Inc.

4. There is no compelling reason why the Less case should have been tried before the Raab case, and indeed, there are strategic reasons why the Raab case should have been tried first. Mr. Sweet points out in his Affidavit that he

considered the Raab case to be "somewhat stronger than the Less case, and less complicated ... ." Affidavit of D. Sweet at p. 22. If that assessment is accurate, and if the Raab case could have been tried quickly and less expensively than the Less case, a favorable result in the Raab case would have brought about a reasonable settlement in the Less case without further effort at preparation of that case.

5. The suggestion by Mr. Sweet that defendants' Motion to Dismiss, made at this point in the case, "smacks of nothing less than bad faith", Affidavit of D. Sweet at p. 2, is unseemly and unfounded. If the Raab case could have been settled on any reasonable basis, that would have been done and there would have been no need for this motion. The preparation of the discovery requests, that defendants were forced to commence because of plaintiff's intransigence about settlement of this case, reinforced a preliminary assessment of grievous injury to defendants' ability to defend this case now that the only two witnesses to the major transactions are dead. Defendants are unable even to plan discovery much less to defend at trial without Messrs. Taber and McDonough. The Motion to Dismiss was the necessary next step.

Deanne C. Siemer
Deanne C. Siemer

Subscribed and sworn to before
me this 17th day of May, 1975

Viola K. Barrett
Notary Public, Erie County, New York.

VIOLA K. BARRETT
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
My Commission Expires March 30, 1976

Supplemental Affidavit of David L. Sweet In Opposition to Defendants' Motion to Dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff

-vs- CIVIL No. 1967-190

TABER INSTRUMENT CORPORATION,
et al.,
Defendants

SUPPLEMENTAL AFFIDAVIT OF DAVID L. SWEET IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

STATE OF NEW YORK : SS.
COUNTY OF ERIE :

DAVID L. SWEET being duly sworn deposes and says :

1. In accordance with the Court's request on argument of this motion, we have prepared and attached to this affidavit a schedule of all depositions taken, showing the dates, names of the deposed, and by whom the discovery was taken.

As the Court is aware, additional depositions were noticed by the plaintiffs in early 1971, of the Teledyne representatives and of defendant, Himmelfarb, but were not taken, all as more fully set forth in our previous affidavit.

2. The defendants' supplemental affidavit and reply memorandum were apparently delivered to our office late Saturday afternoon, May 17, and were first seen by us Monday morning, May 19th. They contain certain factual distortions and inaccuracies as to material matters which we feel need to be answered and corrected, as do certain arguments advanced in Court.

3. In paragraph 3 of their supplemental affidavit, and also in their reply memorandum, defendants imply that the total cost to plaintiffs of taking the depositions of Dr. Singleton and Mr. Kaufman in California would have been only one round trip airfare, plus incidental expenses, or about $400.00. Actually, under the prevailing practice we would have been required to pay the expenses of airfare and overnight accommations of attorneys Hitchcock, McDonough and Boreanaz, as well as our own, at a total cost close to $1800.00.

4. In paragraph "4" of their supplemental affidavit defendants imply that the Raab case should really have been tried first. However, it was obvious to all counsel

from the beginning that the complex and intricate issues common to both cases, i.e., the timing, nature and extent of the Teledyne-TIC negotiations and ultimate acquisition, should be thrashed out first in the Less action, if in fact the two cases were not to be tried together. This was confirmed on several occasions by all counsel and is reflected in the Court's order of June 14, 1974.

5. In the concluding paragraph of their supplemental affidavit, the defendants insinuate that they were only very recently compelled, because of what they describe as "plaintiff's intransigence about settlement" to take their first hard look at the Raab case, and that this was when they discovered their position was such that they had to make this motion. However, that is belied by their lengthy memorandum of March 22, 1974, submitted in opposition to our motion for consolidation of the two actions, which shows in minute detail the results of an intensive and thorough review by them of both the Less and Raab proceedings. That memorandum was submitted well in advance of the June 3, 1974 agreement of all counsel that Less be tried first, and Raab deferred.

Supplemental Affidavit of David L. Sweet In Opposition to Defendants' Motion to Dismiss.

6. At pages 17 and 18 of the reply memorandum defendants assert, without foundation, and in direct contrast to the manner in which the defendants actually did proceed, that had plaintiffs announced their discovery completed in November, 1967 " presumably defendants would have completed their discovery within 90 days, and the case would have been ready for trial ". In fact, however, the defendants took discovery of the plaintiffs during 1968, 1969 and 1970, and with respect to that discovery there is not even any claim that they were awaiting any such announcement by the plaintiffs.

7. As pointed out in our previous affidavits, after the matters of the taking of the depositions of the Teledyne representatives and defendant Himmelfarb had been resolved in October 1971, the plaintiffs promptly filed notes of issue in both actions and reported our discovery complete at the next call of the cases and at every conference or call thereafter.

8. Throughout the proceedings, the two cases were always called and dealt with and reported as companion cases. All the pretrial statements filed were

combined statements for both cases. Defendants' present assertion that discovery taken under the caption "Less" should be disregarded in measuring activity in the Raab case is contradictory to everything that has occurred throughout these proceedings.

In addition, even certain discovery taken in Less dealing with the purchase of the Less stock was also relevant to the Raab case. For example, the depositions of defendant D'Angelo's agent, Mr. Bartlo, taken in September and October 1969, regarding his efforts to purchase the Less 14,100 shares showed how D'Angelo, an insider, assessed the importance of the Teledyne-TIC negotiations, and thus pertained directly to the common issue of both cases, i.e., whether the negotiations were serious enough to require their disclosure. The deposition of another insider, Himmelfarb, who acquired one-half of the Less shares, would likewise have been pertinent to this common issue.

9. With regard to defendants' claim of prejudice by reason of the loss of the live testimony of Ralph Taber and Charles McDonough, as we have pointed out, the plaintiffs have consistently reported themselves ready

for trial since the filing of our notes of issue in October, 1971, and are not accountable for the delays occasioned by subsequent events which were entirely outside the plaintiffs' control.

In addition, the loss of Mr. Taber as a potential live witness was already known to the defendants when they agreed, in June 1974, that Raab be deferred in order to try Less first. Also, there is not and never has been any claim that there were any direct dealings between Mr. Taber and the plaintiff Raab, or Raab's representative, Mr. Ness, for either the purchase of Raab's TIC stock or the settlement of his suit for profit sharing moneys. (Regarding the secondary question of whether the defendants had opportunity to preserve Mr. Taber's testimony on other matters, had they genuinely considered it important, we have attached hereto a copy of his death notice, which states that he died after a long illness.)

As to Mr.McDonough's testimony, the defendants have available his several depositions, including the deposition covering his negotiations with W. Franklin Ness for both the purchase of Raab's stock and the settlement of his suit for profit sharing moneys. The plaintiff however, is deprived of the opportunity to seek Mr. McDonough's testimony at trial concerning the matters as to which he invoked privilege.

Also, we are now informed that the plaintiff has lost the testimony of Mr. Ness, since, as we understand, he died in Florida a little over a week ago. Thus, plaintiff Raab has been seriously prejudiced by the prolonged delay on the part of the defendants with regard to their appointment of substitute counsel, and their becoming prepared for trial, and their subsequent insistence, in March 1975, more than two years after Mr. Taber's death, and seven months after Mr. McDonough's death, upon further discovery. The plaintiff is the aggrieved party not the defendants.

By comparison with the Less case, in which the defendants declared themselves ready for trial in the fall of 1974, after the deaths of Mr. Taber and Mr. McDonough, the defendants are if anything in a relatively stronger position. In Less, the defendants were faced with the prospect of live adverse testimony from witnesses Sweet and Murphy, regarding the negotiations with Mr. McDonough for the purchase of the Less stock. In Raab, the plaintiff's representative, Mr. Ness, who conducted the negotiations with Mr. McDonough, is now dead, and the plaintiff has only the version of those negotiations contained in the deposition of Mr. Mc Donough, a hostile witness.

David L. Sweet

Subscribed and sworn to before
me this 20th day of May, 1975.

Ruth A. Koeb

Commissioner of Deeds
In and for City of Buffalo
My Commission Expires 12/31/76

Supplemental Affidavit of David L. Sweet In Opposition to Defendants' Motion to Dismiss.

SCHEDULE OF DEPOSITIONS TAKEN IN LESS & RAAB PROCEEDINGS

Date	Party	By Whom Taken
7/31/67	Ralph F. Taber	Plaintiff (Less)
8/1/67	Ralph F. Taber	" "
8/3/67	Ralph F. Taber	" "
8/3/67	Warren Hildebrandt	" "
8/4/67	Benjamin Manasen	" "
10/26/67	Warren Hildebrandt	" "
10/26/67	Teledyne Inc., by the General Mgr. of N. Tona, N. Y. Plant, Leland Coulter	" "
11/9/67	Joseph D'Angelo	" "
2/12/68	Joseph D'Angelo	" "
2/12/68	Joseph Less	Defendants
5/17/68	Charles Till, V. P. Marine Midland Trust Company, First Trust Office	Plaintiff (Less)
7/17/69	Joseph Less	Defendants
7/31/69	Joseph Less	"
9/26/69	Noel Bartlo	Plaintiff (Less)
10/15/69	Noel Bartlo	" "
1/29/70	Charles McDonough	" "
7/13/70	Charles McDonough	" "
7/13/70	Charles McDonough	Plaintiff (Raab)
10/1/70	Charles McDonough	Plaintiff (Less)
10/1/70	Junia Raab	Defendants

Date	Party	By Whom Taken
10/21/72	Eugene Murphy	Defendants
10/21/72	David Sweet	"
10/28/72	Eugene Murphy	"
10/28/72	David Sweet	"

Supplemental Affidavit of David L. Sweet In Opposition to Defendants' Motion to Dismiss.

Ralph Taber Dies; Inventions Aided U. S. Space Effort

Ralph T. Taber, 72, an inventor whose North Tonawanda company supplied instruments to the United States space program and Apollo moonshots, died Friday (Feb. 16, 1973) in Honolulu after a long illness.

Mr. Taber maintained residences on Park Lane Court, Williamsville, and in Honolulu.

A graduate of Carnegie Technical Institute with a degree in mechanical engineering, Mr. Taber held more than 20 patents for abrasion-testing equipment and thermo-plastic forming processes. In 1940, he used these ideas as the basis for founding the Taber Instrument Co. at 111 Goundry St., North Tonawanda.

Many of the procedures and equipment developed by his company are now accepted as worldwide industry standards.

After turning for a time to development of large machinery and lathe design, Mr. Taber opened an electronics division in 1958. The company provided equipment for the Apollo, Titan and Poseidon programs.

In 1966, the 15 stockholders of Taber Instrument Co. voted to sell its assets to Teledyne Inc., a California electronics manufacturer. The company is now operated as Teledyne Taber, 455 Bryant St., North Tonawanda. Mr. Taber then retired.

Services in Forest Lawn will be private.

Surviving are his wife, the former Cindy Render; a brother, Fred, of Seattle, Wash., and a sister, Miss Gertrude Taber of Sylvania, O.

BEST COPY AVAILABLE

Supplemental Affidavit of James P. Heffernan in Opposition to Defendants' Motion to Dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff

vs. CIVIL No. 1967-190

TABER INSTRUMENT CORP., et al.,
Defendants

SUPPLEMENTAL AFFIDAVIT OF JAMES P. HEFFERNAN IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS.

STATE OF NEW YORK : SS.
COUNTY OF ERIE :

JAMES P. HEFFERNAN, being duly sworn deposes and says :

1. This affidavit is made to clarify certain matters raised in defendants' supplemental affidavit and reply memorandum and in the arguments advanced to the Court on the argument of this motion.

2. The defendants' recent statements to the effect that the Raab case either could or should have been tried before the Less case are entirely at odds with the practicalities of the situation, and with the understanding

of ourselves and counsel for the defendants, including their previous counsel, Mr. McDonough. If the cases were not to be consolidated or tried jointly, it obviously made sense to try the important common issues as to the Teledyne-TIC negotiations first in the Less case. That understanding was specifically confirmed by Mr. McDonough on at least one occasion, in my presence. In the course of the pretrial conference in February 1973 before Magistrate Maxwell, which I attended with my partner, David L. Sweet, Mr. Mc Donough stated that he felt there would be little difficulty in arriving at settlement of the Raab case once the Less case were resolved; we said we agreed and none of the other opposing counsel present expressed any disagreement.

That understanding of all counsel that the Less case should be tried first was later confirmed by the agreement to that same effect entered into by former and substitute defense counsel alike at the June 3, 1974 meeting, and is reflected in the Court's order of June 14, 1974. The present motion appears to be essentially a last minute effort by the defendants to renege on that agreement.

Supplemental Affidavit of James P. Heffernan in Opposition to Defendants' Motion to Dismiss.

3. Regarding the significance of our filing of notes of issue early in the proceedings, we were merely following Rule 12 of the Local Rules to bring the cases up on the trial calender, in the hope that pretrial discovery might be completed by the time the cases were reached. However, we did not report to the Court or counsel at the ensuing calendar calls that the cases were ready for trial, but instead joined with opposing counsel in reporting to the Court as to the then current status of the proceedings and the additional discovery yet to be taken, whereupon the cases were put over the term. In my thirty-five years of experience before this Court it was not at all unusual for this procedure to be followed.

4. We have shown in our previous affidavits and exhibits examples of the numerous instances where the progress of the discovery was interrupted or delayed because of conflicting engagements of opposing counsel, especially Charles McDonough, and there were many such occasions. As the Court is aware there was probably not a busier trial lawyer in this area than Mr. McDonough. Perhaps from the cold record it may appear that we might

have been more stringent in dealing with the problem. However, at the time and under the circumstances it appeared in order to extend such accommodation and courtesy to fellow lawyers. When we found that the delays were becoming unduly burdensome, we wrote to Mr. McDonough on June 23rd, 1970, pointing that out.(See Exhibit "A" to the affidavit of David L. Sweet, sworn to May 14th,1975). In any event it would surely be unfair to permit the defendants, through their substitute counsel, to take advantage of the fact that such accommodation and courtesy were previously afforded their original counsel.

5. Finally, despite all arguments advanced by the defendants, the record is clear that we completed our own discovery procedures by October, 1971, and promptly, that same month, filed notes of issue in both the Less and Raab cases, and reported the plaintiffs ready at the next call of the two cases; that following further discovery thereafter noticed and taken by defendants in the Less case, the cases were reported and marked ready by the Magistrate at the final pretrial conference in February 1973, and referred to the Court for scheduling of trial, and after-

Supplemental Affidavit of James P. Heffernan in Opposition to Defendants' Motion to Dismiss.

wards we consistently indicated to the Court and opposing counsel, whenever the opportunity arose, that we were ready for trial in both cases.

Subscribed and sworn to before
me this 20th day of May, 1975.

Ruth A. Koel

Commissioner of Deeds
In and for City of Buffalo
My Commission Expires 12/31/76

Letter from Deanne C. Siemer to Judge Curtin.

Falk, Siemer, Glick, Tuppen & Maloney
Attorneys at Law
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SHELDON B. BENATOVICH
EDWIN H. WOLF
MICHAEL G. KELLY
DEANNE C. SIEMER

EUGENE L. FALK, 1867-1929
BRADLEY H. PHILLIPS, 1870-1938
FREDERIC R. TWELVETREES, 1892-1957

J. CLEMENT JOHNSTON
COUNSEL

May 21, 1975

Hon. John T. Curtin
United States Courthouse
Buffalo, New York

Re: Raab v. Taber Instrument Corp.,
Civ. No. 1967-190

Dear Judge Curtin:

I was surprised to receive in the mail today two more affidavits from Messrs. Sweet and Heffernan which appear to carry on their oral argument at some length. These affidavits seem inappropriate since permission was not requested of the court to file any post-hearing argument. Plaintiff's counsel seeks to excuse this omission on the ground that he did not receive defendants' reply memorandum and supplemental affidavit until the morning of the oral argument. In rebuttal, it should be pointed out that the order of this court dated May 1, 1975 provided that defendants' papers could be served on Saturday, May 17, 1975, as they were, and the certificate of service filed with those papers specifically notes that on Friday, May 16, 1975, I informed Mr. Sweet in a telephone conversation that the reply papers would be served Saturday afternoon. The Saturday service was made necessary because Mr. Sweet was unable to serve his papers in opposition to defendants' motion until Thursday, May 15, 1975, four days after the date set by the court's order.

In response to the substantive arguments made in these new affidavits (as well as in previous affidavits), defendants contend that even if the court accepts all of plaintiff's assertions about the actions taken and permits great latitude as to the definition

Letter from Deanne C. Siemer to Judge Curtin.

under Rule 41(b) of an action taken to prosecute plaintiff's claim, plaintiff's defense must still fail because the delay is overwhelming. Attached hereto is an outline listing every action claimed by plaintiff to have been taken to prosecute this claim from October 26, 1967, when they first filed a note of issue declaring the case ready for trial, until June 3, 1974 at which time the court, on its own initiative, set trial dates. There are a total of 343 weeks in this time period. Plaintiff claims some activity (including letters and phone calls) in 39 of those weeks. That leaves 89% of the weeks during this period when plaintiff, by counsel's own presumably thorough accounting, set out in four affidavits, did nothing. Moreover, if one subtracts items 27, 29, 30, 32, 37, and 39, which actions are merely attending pretrial conferences as ordered by the court, the percentage of weeks in which plaintiff did nothing climbs to over 90%. All of plaintiff's verbiage about complexities and difficulties cannot counter this very stark fact.

Defendants contend that plaintiff's many references to letters, phone calls and other actions in the *Less* case are irrelevant because Rule 41(b) requires plaintiff to take action to bring the *Raab* case on to trial, and no other ancillary actions can substitute for this single requirement. Under that standard, the items from the Bartlo deposition about dealings on behalf of D'Angelo, cited by plaintiff to establish relevance of that deposition to the *Raab* case, are merely cumulative because D'Angelo had already so testified in his deposition on November 9, 1967. (*See* D'Angelo deposition, pp. 412-15, 485-90, 542-45). Under the standard that defendants contend should be applied, only items 1, 2, 13, 26, 28, 33 and 36 could possibly be relevant and the percentage of weeks in which the plaintiff did nothing soars to 98%.

The news of Mr. Ness' death certainly adds to the reasons why this action should be dismissed. Now three of the four participants in the Raab-Taber Instrument Corporation transaction are dead. Only plaintiff is left to give his version in great and uncontradicted detail.

Respectfully submitted,

Deanne Siemer
Deanne C. Siemer

DCS:M
Enc.

cc: Mr. Sweet
Mr. Hitchcock
Mr. Fuzak
Mr. Runfola

Letter from Deanne C. Siemer to Judge Curtin.

Items of Plaintiff's Activity
from October 26, 1967 to June 3, 1974
Submitted In Opposition to Motion to Dismiss

Item No.	Date	Activity	Affidavit reference
1	11/9/67	deposition of D'Angelo	Sweet I, p.4 */
2	2/12/68	deposition of D'Angelo	Sweet I, p.4
3	5/17/68	deposition of Till	Sweet I, p.5
4	1/23/69	affidavit in opposition to motion to compel answers (Less deposition)	Sweet I, p.6
5	9/26/69	deposition of Bartlo	Sweet I, p.5
6	10/15/69	deposition of Bartlo	Sweet I, p.5
7	1/29/70	deposition of McDonough	Sweet I, p.5
8	4/24/70	letter to McDonough	Heffernan I, Ex.F **/
9	4/27/70	letter to McDonough	Heffernan I, Ex.E
10	6/2/70	letter to McDonough	Heffernan I, Ex.G
11	6/12/70	letter to court	Heffernan I, Ex.H
12	6/23/70	letter to McDonough	Sweet I, Ex.A
13	7/13/70	deposition of McDonough	Sweet I, p.5
14	10/1/70	deposition of McDonough	Sweet I, p.5
15	-/ -/71	conversation with Kaufman	Sweet I, p.8
16	-/ -/71	conversations with Letts	Sweet I, p.8
17	-/ -/71	conversations with Boreanaz	Sweet I, p.9
18	3/29/71	letter to Boreanaz	Sweet I, Ex.B
19	5/5/71	notices of deposition served on Singleton and Himmelfarb	Sweet I, pp.8-9
20	6/1/71	letter to McDonough	Sweet I, Ex.C
21	6/17/71	affidavit in opposition to motion to quash subpoena (Singleton deposition)	Sweet I, p.8
22	7/ -/71	attended hearing on motion to quash	Sweet I, p.8
23	8/19/71	letter to Boreanaz	Sweet I, Ex.D
24	9/9/71	attended deposition of Himmelfarb	Sweet I, p.10

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*/ Sweet Affidavit dated May 14, 1975

**/ Heffernan Affidavit dated May 14, 1975

Letter from Deanne C. Siemer to Judge Curtin.

Item No.	Date	Activity	Affidavit reference
25	10/12/71	motion to strike Himmelfarb's answer	Sweet I, p.10
	10/15/71	attended hearing on motion to strike	Sweet I, p.10
26	10/27/71	note of issue filed	Sweet I, p.11
27	8/ -/72	attended pretrial conference	Sweet I, p.11
28	2/ 6/73	filed pretrial statement	Sweet I, p.12
29	2/7/73	attended pretrial conference	Sweet I, p.12
30	3/13/73	attended pretrial conference	Sweet I, p.13
31	-/ -/73	conversations with Bain	Sweet I, p.14
32	7/5/73	conversation with Bain	Sweet I, p.14
33	8/21/73	motion to substitute defendants	Sweet I, p.15
34	1/18/74	conversation with Siemer	Sweet I, p.15
35	2/7/74	attended pretrial conference	Sweet I, p.16
36	2/14/74	motion for consolidation	Sweet I, p.17
37	2/22/74	attended pretrial conference	Sweet I, p.16
38	3/20/74	withdrew motion for consolidation; sent letter to the court	Sweet I, p.17,Ex.F.
39	4/29/74	attended pretrial conference	Sweet I, p.18

Interrogatory by Joseph P. D'Angelo.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION, et al.,

Defendants

CIVIL NO. 1967-190

INTERROGATORY

TO: HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff
1200 Marine Trust Building
Buffalo, New York 14203

The defendant, Joseph P. D'Angelo, requests that the plaintiff answer under oath and in accordance with Rule 33 of the Federal Rules of Civil Procedure the following interrogatory:

1. State in full the facts you intend to present in support of your claim that liability exists on the part of defendant Joseph P. D'Angelo.

PLEASE TAKE NOTICE that a copy of such answer must be served upon the undersigned within 30 days after the service of this interrogatory.

Dated: Buffalo, New York
May 21, 1975

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for Defendant Joseph P. D'Angelo

By ______________________
Member of the Firm

Office and Post Office Address
Suite 3400, One Marine Midland Center
Buffalo, New York 14203

UUr

Notice of meeting with court on July 17, 1975.

NOTICE OF Meeting With Judge Curtin D.C. Form 18 (Rev. Sept. 1953)

United States District Court
FOR THE
Western District Of New York

Rec'd
7/7/75

Junia E. Raab
v.
Faber Instrument Co., et al

No. Civ-1967-190

TAKE NOTICE that the above-entitled case has been set for Meeting with Judge/ Curtin at Buffalo, N.Y., on July 17, 1975, at 9:00 A.M.

Date July 3, 1975

JOHN K. ADAMS
Clerk.

By Robert J. White
Deputy Clerk.

To David L. Sweet, Esq.
Deanne C. Siemer
Robert M. Hitchcock, Esq.
Arnold H. Zelman, Esq.
Victor T. Fuzak, Esq.
Ross L. Runfola, Esq.

Decision and Order of Dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

-vs-

Civil 1967-190

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT,

Defendants

APPEARANCES: HEFFERNAN, SWEET & MURPHY (DAVID L. SWEET, ESQ., of Counsel), Buffalo, New York, for Plaintiff.

FALK, SIEMER, GLICK, TUPPER & MALONEY (EDWARD D. SIEMER and DEANNE C. SIEMER, ESQS., of Counsel), Buffalo, New York, for Estate of Ralph F. Taber.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER (ROBERT M. HITCHCOCK, ESQ., of Counsel), Buffalo, New York, for Defendant Joseph P. D'Angelo.

BRENNAN, CALLAHAN, TESSEYMAN, ZELMAN & RUMFOLA (ARNOLD N. ZELMAN and ROSS L. RUMFOLA, ESQS., of Counsel), Buffalo, New York, for Defendant Benjamin Manasen.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (VICTOR T. FUZAK, ESQ., of Counsel), Buffalo, New York, for Defendant Warren J. Hildebrandt.

Decision and Order of Dismissal.

Defendants move to dismiss this action under Rule 41(b) of the Federal Rules of Civil Procedure for failure of plaintiff to prosecute, and also move to dismiss because the delay of the plaintiff has caused irreparable injury to defendants. In opposition to this motion, plaintiff asserts that the history of this case must be considered in relationship to that of Less v. Taber Instrument Corporation, Civil 1967-182, which was filed on May 9, 1967 and in which many of the same issues were involved. The same attorneys represented the parties in both cases. Violations of §10(b) of the Securities and Exchange Act of 1934 and Rule 10(b) of the Securities and Exchange Commission were charged. In each case the plaintiff alleges that Taber Instrument Corporation [Taber Instrument] bought plaintiff's stock without disclosing to plaintiff that serious negotiations were being conducted with Teledyne, Inc. for the acquisition of Taber Instrument for a price equivalent to about $50 per share. Less' 14,100 shares of stock were purchased on May 4, 1966 for $10 per share, and Raab's 600 shares of stock were purchased on June 6, 1966 for $8 per share. The defenses in each case were similar. Defendants denied the allegations of secret dealing with Teledyne, Inc. [Teledyne] and assert that the price paid was a good one. Both plaintiffs received at the time of payment certain profit sharing moneys claimed by them from the corporation's profit sharing plan.

When the Less case was set for trial in the fall of 1974, it was settled for the sum of $560,000. Following disposition of the Less case, efforts to settle the Raal case proved fruitless. When the court had not heard from counsel, in February 1975 a meeting was scheduled. This motion to dismiss was filed shortly thereafter, in April 1975. The court then held another round of sessions with counsel in an attempt to settle this litigation, without success.

By this motion, defendants charge that plaintiff did little or nothing to prepare and bring this case to trial from 1967 until the present and, upon that ground alone, dismissal should be granted. Messenger v. United States, 231 F.2d 328 (2d Cir. 1956). In Messenger, the "operative condition of the Rule [41(b)]" was described as "lack of due diligence on the part of the plaintiff--not a showing by the defendant that it will be prejudiced . . . ." 231 F.2d at 331. An additional ground asserted by defendants is that, because of plaintiff's delay, defendants are deprived of the testimony of their two most important witnesses, Ralph Taber and Charles McDonough. On February 16, 1973 Mr. Taber, who had been president, founder and principal stockholder of Taber Instrument, died. Charles McDonough, the attorney for Mr. Taber and the corporation, died on August 16, 1974. Both had been closely connected with the negotiations with Mr. Raab and with Teledyne. Defendants assert that without their testimony, their case is seriously prejudiced. Furthermore, in May 1975 Franklin Hess, who was one of the principal negotiators for plaintiff, also died.

An examination of the Clerk's docket and the papers filed reveals an almost complete lack of activity on the part of plaintiff from 1967 until 1974. One explanation which plaintiff offers for this is that the depositions taken in the *Less* case were to be used also in the Raab case. There is nothing in the record to support plaintiff's assertion and defendants vigorously deny that there was any agreement between the parties to this effect. Probably the evidence about the negotiations between Teledyne and Taber Instrument would be pertinent to both cases, but the negotiations between Mr. Less and Taber Instrument would not be relevant to the Raab case. When the record in the Raab case is considered standing alone, plaintiff took no action whatever in 1967 or 1968 beyond filing a note of issue in each year certifying that the case was ready for trial. In fact, as later events bore out, the case was not at all ready for trial at those times. In 1969, because plaintiff did nothing at all, the case appeared on the dismissal calendar in February 1970. Because plaintiff promised to take prompt action in preparing for trial, dismissal was stayed by the court until June 1970. Although plaintiff's activity from February to June was limited to taking a short deposition from Charles McDonough, nevertheless, the court lifted the threat of dismissal. Promises of continued preparation were short-lived, however, for the only action plaintiff took during

1970 was to file a note of issue in October.

In early 1971 when plaintiff's application for the late filing of a note of issue was granted, the court set a pretrial conference for April 2, 1971. In preparation for the pretrial conference, plaintiff was directed to submit a detailed statement of fact, a statement of legal issues, a list of exhibits, a list of possible witnesses and a list of depositions to be used at trial. Plaintiff failed to file the required statement on time, but instead filed a notice of issue in October 1971. In 1972 the case went to the Magistrate for a pretrial conference but, since plaintiff had failed to comply with the order directing the filing of a pretrial statement, the meeting was adjourned until December 13, 1972. For various reasons, the conference was adjourned again until February 1973 when plaintiff finally filed the directed statement, and another conference was held on March 16, 1973. At that time the death of Mr. Taber in February 1973 was reported. Delay necessarily followed so that the executors for his estate could be appointed and substituted as parties in the action. In September 1973, plaintiff's motion to substitute the executors of Mr. Taber's estate as parties-defendant was granted. However, plaintiff took no action until February 1974 when again the court scheduled a meeting. Plaintiff's response to that notice was to file a motion to consolidate the Raab case with the Less case. After all defendants objected, the motion was withdrawn at a meeting held with the court on June 3, 1974. At that meeting, a trial date was set for the Less case in the fall of 1974, and the Raab case was postponed until after the Less case was completed.

In order to highlight the argument of plaintiff's counsel in a manner most favorable to him, I have attached a schedule of depositions taken in both the Less and Raab proceedings, prepared by the plaintiff in opposition to this motion.[1/] This list reveals that in 1967 eight depositions were taken; in 1968, three; in 1969, four; in 1970, five; in 1971, none; and in 1972, four. I have also attached a schedule prepared by defendants, which is an analysis of plaintiff's activities from October 26, 1967 to June 3, 1974, as revealed by the affidavits of plaintiff's counsel submitted in opposition to this motion to dismiss.[2/] This schedule does not purport to set forth everything plaintiff did, but evidently plaintiff's counsel believed that the activities listed were important enough to list. It is apparent from a perusal of these schedules that plaintiff approached the preparation of these cases in a most leisurely fashion. There were many months when nothing occurred at all, and, in some instances, a span of several months elapsed before plaintiff took any action. Plaintiff failed to resort to any discovery devices beyond the taking of depositions. No interrogatories were posed and no requests for admissions were sought. Plaintiff's counsel asserts that there was delay in the taking of some depositions because of the refusal of some witnesses to answer questions put to them which required resort to the court for direction. This happened on occasion, but the taking of some depositions was adjourned for several months at the request of plaintiff's counsel to examine documents.

Decision and Order of Dismissal.

Plaintiff's counsel has failed to explain satisfactorily why there was a delay in the attempt to take the depositions of the Chairman and counsel of Teledyne and of the defendant Himmelfarb, who was in the Less case, until 1971. The Teledyne witnesses resided in California and Mr. Himmelfarb in Mexico. After plaintiff was rebuffed in efforts to obtain an order requiring these witnesses to travel to Buffalo for a deposition, the efforts to depose them were dropped. When the issues at stake in these cases are considered, it is difficult to understand why the plaintiffs did not pay the plane fare for travel to Buffalo. In any event, plaintiff's counsel offered no excuse for the four-year delay.

The record does not support plaintiff's argument that the delay was caused because this was a complex securities case. There were only about five persons involved in the transactions between Taber Instrument and Teledyne, and only four between Taber Instrument and the plaintiff. In support of the claim of complexity, plaintiff's counsel describes the exhibits as comprising a pile a foot and a half in height. However, almost all of these documents were available to plaintiff since November 1967, at which time plaintiff had taken the depositions of Mr. Taber and Mr. D'Angelo. Furthermore, there are many cases in which the number of documents and complexity of the issues are much greater than in this case.

After the death of Mr. Taber in 1973, the proceedings were delayed to obtain the appointment of an executor for Mr. Taber's estate and to obtain representation for the estate. This delay cannot be attributed to plaintiff. Robert M. Hitchcock, who was counsel for defendant D'Angelo, reported that his firm was also the attorney for the estate of Ralph Taber. Special arrangements had to be made before the Siemer firm could be retained by the estate. Delay was caused because Mr. McDonough insisted upon remaining as trial counsel in spite of the fact that he was an important witness. However, plaintiff had been aware of this problem from the beginning of the lawsuit and had made no move to require substitute counsel until 1973. In addition, plaintiff's attorneys were also witnesses to the negotiation of the sale of Mr. Raab's interest. They made no effort to secure trial counsel until shortly before the *Less* case was set for trial.

Further complication arose in February 1974 when the Honorable John O. Henderson, Chief Judge in this district, died. I was left with the conduct of all civil and criminal cases in the Buffalo area until January 1975. At the time of his death, I was engaged in the trial of a complicated organized crime case which did not end until late April 1974. Following an April 29, 1974 meeting with counsel, plaintiff promptly complied with the orders of the court and was ready to proceed in October 1974 when defendants requested a one-month delay.

The belated activity of plaintiff in 1974 cannot save plaintiff's cause. Although dismissal with prejudice is a harsh remedy which should be utilized only in extreme situations, *Theilmann v. Rutland Hospital, Inc.*, 455 F.2d 853 (2d Cir. 1972), nevertheless, the authority to invoke it for lack of prosecution is an inherent ". . . control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash Railroad Co., 370 U.S. 626, 630-31 (1962). In Theilmann, dismissal was granted for failure to prosecute when plaintiff's counsel failed to appear for trial on the date set some fifteen or twenty days earlier, and counsel appeared the following day and argued for adjournment. In Securities and Exchange Commission v. Power Resources Corp., 495 F.2d 297 (10th Cir. 1974), the dismissal was granted for failure to prosecute under Rule 41(b) when there was a three-year delay. The plaintiff SEC attempted to excuse this period of inactivity on the ground that it was conducting discovery. Where the facts depict "a drawn-out history" of "deliberately proceeding in dilatory fashion" the action may be dismissed. Link v. Wabash Railroad Co., supra, at 633. In Von Poppenheim v. Portland Boxing & Wrestling Commission, 442 F.2d 1047 (1971), dismissal was granted pursuant to Rule 41(b) where plaintiff failed to comply for eleven months with court order that he set forth with specificity acts which he claimed formed the basis of his antitrust suit.

Decision and Order of Dismissal.

Recently the Second Circuit had occasion to discuss Rule 41(b) in Finley v. Parvin/Dohrmann Co., Inc., (2d Cir., No. 1285, decided August 6, 1975). In that case, after the complaint was filed in August 1970, it was transferred from Illinois to New York. About a year later, plaintiff filed notices to take depositions and, by stipulation, these depositions were put off until May 1972. The case lay dormant for three years until March 1975, when it was assigned to Judge Wyatt in the Southern District of New York. Judge Wyatt refused to dismiss the action under Rule 41(b) because he believed that confusion arose upon how to proceed under the individual assignment system which had recently gone into effect in the Southern District. However, Judge Friendly pointed out that the Circuit Court "would not have reversed if Judge Wyatt had granted the motion to dismiss." Slip op. at 5390.

Some courts have held that there is no duty upon the defendant to expedite the case and urge disposition of it. See Bendix Aviation Corp. v. Glass, 32 F.R.D. 375, 378 (E.D. Pa. 1962). However, in approaching a decision in this case, I have taken into consideration the suggestion made in the Finley case that the failure of a defendant to call the court's attention to a plaintiff's undue delay in bringing a case on for trial, by formal motion or otherwise, may be considered as a factor in forming the court's discretion. In the Raab case, the defendants have always asserted their readiness for trial. At times they sought adjournments of depositions from the plaintiff, but the plaintiff agreed to this procedure and took no steps to hasten discovery. The defendants never delayed proceedings before the court.

In considering the history of this case, there are many reasons why the motion to dismiss under Rule 41(b) must be granted. Beyond taking an occasional deposition, the plaintiff did little or nothing to prepare from 1967 until February 1973, when counsel filed a belated pretrial statement. On numerous occasions, the court urged plaintiff's counsel to prepare and warned that failure to prepare could result in dismissal. These warnings were ignored. No reason is given for the delay in the application for the taking of the Himmelfarb and

Teledyne witnesses until 1971, four years after the institution of the case, for the leisurely pace of deposition taking of other witnesses from 1967 until 1971, or for the failure to use other discovery devices. No applications were made by plaintiff to bring defendants to account if they failed to abide by a scheduled date for a deposition taking. The plaintiff has not even attempted to explain why he failed to comply, from April 1971 until February 1973, with the court order to file a pretrial statement.

Because plaintiff has failed to prosecute this case reasonably for trial, the motion to dismiss is granted on that ground alone. Furthermore, the motion is also granted because plaintiff's delay has now seriously prejudiced defendants' case. Messrs. Taber and McDonough are no longer present to set forth defendants' position on the issues. The Clerk is directed to enter judgment against the plaintiff, in favor of all the defendants, dismissing the complaint.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: November 25, 1975

1/

SCHEDULE OF DEPOSITIONS
TAKEN IN LESS & RAAB PROCEEDINGS

Date	Party	By Whom Taken
7/31/67	Ralph F. Taber	Plaintiff (Less)
8/1/67	Ralph F. Taber	" "
8/3/67	Ralph F. Taber	" "
8/3/67	Warren Hildebrandt	" "
8/4/67	Benjamin Manasen	" "
10/26/67	Warren Hildebrandt	" "
10/26/67	Teledyne Inc., by the General Mgr. of N. Tona, N. Y. Plant, Leland Coulter	" "
11/9/67	Joseph D'Angelo	" "
2/12/68	Joseph D'Angelo	" "
2/12/68	Joseph Less	Defendants
5/17/68	Charles Till, V. P. Marine Midland Trust Company, First Trust Office	Plaintiff (Less)
7/17/69	Joseph Less	Defendants
7/31/69	Joseph Less	"
9/26/69	Noel Bartlo	Plaintiff (Less)
10/15/69	Noel Bartlo	" "
1/29/70	Charles McDonough	" "
7/13/70	Charles McDonough	" "
7/13/70	Charles McDonough	Plaintiff (Raab)
10/1/70	Charles McDonough	Plaintiff (Less)
10/1/70	Junia Raab	Defendants

Decision and Order of Dismissal.

Date	Party	By Whom Taken
10/21/72	Eugene Murphy	Defendants
10/21/72	David Sweet	"
10/28/72	Eugene Murphy	"
10/28/72	David Sweet	"

2/

Items of Plaintiff's Activity
from October 26, 1967 to June 3, 1974
Submitted In Opposition to Motion to Dismiss

Item No.	Date	Activity	Affidavit reference
1	11/9/67	deposition of D'Angelo	Sweet I, p.4 */
2	2/12/68	deposition of D'Angelo	Sweet I, p.4
3	5/17/68	deposition of Till	Sweet I, p.5
4	1/23/69	affidavit in opposition to motion to compel answers (Less deposition)	Sweet I, p.6
5	9/26/69	deposition of Bartlo	Sweet I, p.5
6	10/15/69	deposition of Bartlo	Sweet I, p.5
7	1/29/70	deposition of McDonough	Sweet I, p.5
8	4/24/70	letter to McDonough	Heffernan I, Ex.F **/
9	4/27/70	letter to McDonough	Heffernan I, Ex.E
10	6/2/70	letter to McDonough	Heffernan I, Ex.G
11	6/12/70	letter to court	Heffernan I, Ex.H
12	6/23/70	letter to McDonough	Sweet I, Ex.A
13	7/13/70	deposition of McDonough	Sweet I, p.5
14	10/1/70	deposition of McDonough	Sweet I, p.5
15	-/ -/71	conversation with Kaufman	Sweet I, p.8
16	-/ -/71	conversations with Letts	Sweet I, p.8
17	-/ -/71	conversations with Boreanaz	Sweet I, p.9
18	3/29/71	letter to Boreanaz	Sweet I, Ex.B
19	5/5/71	notices of deposition served on Singleton and Himmelfarb	Sweet I, pp.8-9
20	6/1/71	letter to McDonough	Sweet I, Ex.C
21	6/17/71	affidavit in opposition to motion to quash subpoena (Singleton deposition)	Sweet I, p.8
22	7/ -/71	attended hearing on motion to quash	Sweet I, p.8
23	8/19/71	letter to Boreanaz	Sweet I, Ex.D
24	9/9/71	attended deposition of Himmelfarb	Sweet I, p.10

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*/ Sweet Affidavit dated May 14, 1975

**/ Heffernan Affidavit dated May 14, 1975

Item No.	Date	Activity	Affidavit reference
25	10/12/71	motion to strike Himmelfarb's answer	Sweet I, p.10
	10/15/71	attended hearing on motion to strike	Sweet I, p.10
26	10/27/71	note of issue filed	Sweet I, p.11
27	8/ -/72	attended pretrial conference	Sweet I, p.11
28	2/ 6/73	filed pretrial statement	Sweet I, p.12
29	2/7/73	attended pretrial conference	Sweet I, p.12
30	3/13/73	attended pretrial conference	Sweet I, p.13
31	-/ -/73	conversations with Bain	Sweet I, p.14
32	7/5/73	conversation with Bain	Sweet I, p.14
33	8/21/73	motion to substitute defendants	Sweet I, p.15
34	1/18/74	conversation with Siemer	Sweet I, p.15
35	2/7/74	attended pretrial conference	Sweet I, p.16
36	2/14/74	motion for consolidation	Sweet I, p.17
37	2/22/74	attended pretrial conference	Sweet I, p.16
38	3/20/74	withdrew motion for consolidation; sent letter to the court	Sweet I, p.17,Ex.F.
39	4/29/74	attended pretrial conference	Sweet I, p.18

Judgment On Decision By the Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

-vs-

Civ- 1967-190

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT

SIR: Take notice of an ~~ORDER~~ JUDGMENT**, of which the within is a copy, duly granted in the within entitled action on the** 25th **day of** November 1975**, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the** 25th **day of** November, 1975.

Dated: Buffalo, New York
November 25, 1975

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

TO: David L. Sweet, Esq
Attorney for Plaintiff
Edward D. Siemer, Esq.
Deanne C Siemer, Esq.
Robert M. Hitchcock, Esq.
Arnold N. Zelman, Esq.

TO: Ross L Runfola, Esq. and Victor T. Fuzak, Esq.
Attorney for Defendant

FEDERAL RULES OF CIVIL PROCEDURE 77(d)

Judgment On Decision By the Court.

JUDGMENT ON DECISION BY THE COURT CIV 32 (7-63)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 1967-190

JUNIA E. RAAB

vs.

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable John T. Curtin, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged because plaintiff has failed to prosecute this case reasonably for trial, the motion to dismiss is granted on that ground alone. Furthermore, the motion is also granted because plaintiff's delay has now seriously prejudiced defendants' case.

Dated at Buffalo, New York, this 25th day of November, 1975.

JOHN K. ADAMS

JOHN K. ADAMS
Clerk of Court

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

Plaintiff

CIVIL ACTION

-vs-

1967 - 190

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASHE and WARREN J. HILDEBRANDT

Defendants

PLEASE TAKE NOTICE, that upon the annexed affidavits of JAMES P. HEFFERNAN sworn to December 15, 1975, DAVID L. SWEET sworn to December 15, 1975, and DAVID E. MONTGOMERY sworn to December 9, 1975, and the previous record of this action and of the action formerly pending in this Court entitled " Loss vs. Taber Instrument Corporation, et al, Civil No. 1967-182", and upon all pleadings, discovery depositions, matters and proceedings had herein and in said other action the undersigned will move this Court at the United States Courthouse, Buffalo, New York, on the 22nd day of December, at 11:00 o'clock A.M., or as soon thereafter as counsel can be heard, for an order, pursuant to the provisions of F.R.C.P. 60(b) and the general power of this Court to correct an error and do justice, setting aside and vacating the judgment of this Court made and entered on the 25th day of November, 1975, and restoring the case to the calendar of this Court for

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trial on the merits thereof, and granting plaintiff such other, further and different relief as may be just and equitable.

Dated : December 16th, 1975

Yours, etc

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Attorneys for Plaintiff
1202 Marine Trust Building
237 Main Street
Buffalo, New York 14203
Telephone (716) 854-6960

TO :

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Buffalo, New York 14203

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

Plaintiff

AFFIDAVIT

-vs-

Civil 1967-190

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT

Defendants

STATE OF NEW YORK :
SS.
COUNTY OF ERIE :

DAVID L. SWEET, being duly sworn, deposes and says :

1. I am a member of the firm of Heffernan, Sweet & Murphy, attorneys for the plaintiff, and am familiar with the facts and circumstances of this action.

2. This affidavit is made in support of plaintiff's motion to be relieved from the judgment of dismissal in this action.

3. The decision of the court upon which the judgment of dismissal is based contains many statements of fact which are either in direct conflict with the record or are not supported by the record. In addition, in arriving at its decision the court has found important facts which are controverted in the affidavits and documents submitted upon the motion for dismissal, without a hearing and the taking of sworn testimony

from the various witnesses, as is required for a just and fair determination of contested questions of fact.

The matters to which deponent refers will be pointed out herein in the order in which they appear in the court's decision.

4. In the first full paragraph at page 3 of the decision it is stated "following disposition of the Less case, efforts to settle the Raab case proved fruitless. When the court had not heard from counsel, in February 1975, a meeting was scheduled." In fact, I learned for the first time on January 23, 1975 that the Raab case could not be settled, when I received defendants' offer from Edward Siemer, and I called Deputy Clerk Richard Walsh of this court the next day, January 24, 1975, informed him that settlement negotiations in Raab carried on since settlement of the Less case had been unavailing, and asked him to so advise the court and have the case set down for a final conference to arrange for trial and marking of exhibits, and Mr. Walsh said he would do so. I advised the court of this at the meeting which followed on March 19, 1975. See the transcript of the March 19, 1975 proceedings attached as Exhibit "A", at pages 12 and 13.

5. In the last paragraph on page 4, and again on page 5, the decision indicates that the record in the Raab case must be considered standing alone for purposes of the defendants' motion. That is contrary to the actual facts and circumstances.

The Raab and Less actions were always treated by all parties as companion cases. At calendar calls and pretrial conferences they were consistently answered and dealt with as companion cases, without any indication to the contrary from counsel for the defendants.

The court invariably scheduled pretrial conferences for both actions simultaneously, and often the court's notices and orders were jointly captioned, as in the joint notice of pretrial conference in both cases on March 13, 1973, annexed hereto as Exhibit "B".

Each of the pretrial statements filed by counsel for the plaintiffs and defendants was a joint statement for both Less and Raab , and so captioned.

Counsel for the defendants confirmed at meetings before the Magistrate and the court that they viewed Less as the lead case and that it should be resolved first, in the expectation that Raab could then be disposed of along similar lines.

The most recent acknowledgment of this occurred during the proceedings on March 19, 1975, at which the following colloquy took place :

THE COURT : "How long will this take to try ".

MS. SIEMER : "Well, there is a matter before trial your Honor, and that is as I have said all along I am not satisfied with the discovery in this case. This was a case that was tagging along with the Less case. Everyone's attention was focused on the Less case. There is very little discovery in this case. It is not adequate with respect to our client. I would expect some additional substantial discovery if this case is going to be trial."

MR. SWEET : "We would object to that, your Honor. There is plenty of opportunity for all kinds of discovery. By the time that Miss Siemer's firm got into the case all discovery had been completed and the same, - by the way, there was extensive discovery in the Less case. "

THE COURT : "Here is the problem the way I look at it. If we go to trial without discovery then what we are going to do is we are going to have a lot of thrashing around and it will take, - who knows, - it certainly will take extra time to try without having discovery. The other thing is this, the present counsel got in the case at a late date, certainly, and also in this case everyone agreed that this case should follow along after the Less case."

See Exhibit "A" attached (Transcript of March 19, 1975 proceedings) at pages 9 and 10.

The court confirmed its own belief that in this regard the approach of the parties to the litigation had been reasonable and practical, when in response to defendants' request for additional discovery the court said :

THE COURT : " That is fine, but the thing is that I believe that because of all the things I said before, late time of counsel getting in, you know, as far as everybody's attention, and I think from a practical matter it should have been focused on the other case because there we were talking about a million dollars and this case by comparison is certainly a very, very small one so I think that even though late discovery ought to go ahead. When, how long will it take you to do this ? "

6. The conclusion is stated at page 5 of the decision, but without explanation, that the evidence as to the negotiations between Mr. Less and Taber Instrument would not be relevant to the Raab case. However review of the depositions in Less and Raab, which are filed herewith as Exhibit "C" hereto, would show that the discovery as to the efforts of insider D'Angelo and his agent Mr. Bartlo, to acquire the 14,100 shares owned by Mr. Less is clearly relevant to the question of whether the Teledyne-Taber Instrument negotiations were serious enough to require their disclosure to both Mr. Less and Mr. Raab.

Also, it was brought out in the depositions of McDonough, Sweet, Murphy and Hildebrandt that D'Angelo's recent activity regarding the Less stock was specifically reported to Taber Instrument's representatives, McDonough and Hildebrandt, before the purchase of the Less and Raab shares. This evidence would serve to refute the defense asserted by the management of Taber Instrument that they had no reason to consider the Teledyne negotiations to be of material importance, since they concededly knew that D'Angelo had been handling those negotiations on behalf of Taber Instrument.

7. The indication at the middle of page 5 of the decision that by filing notes of issue in 1967 and 1968, the plaintiff certified that the case was ready for trial does not reflect the actual practice then observed in this court. The form of note of issue used did not contain a statement of readiness for trial, and it had long been common practice for the court to permit cases to be placed on the calendar by the filing of such notes of issue and thereafter to be put over the term for such reasons as further discovery. At the call of the Less and Raab cases following the filing of the notes of issue in 1967 and 1968, we informed the court that the two cases were companion cases, and that discovery was in progress which would have to be completed before trial, and no defendant said otherwise.

The statements at page 5 of the decision concerning the appearance of the Raab case on the dismissal calendar in February of 1970, do not fairly state the actual facts and circumstances. The case appeared on the dismissal calendar in routine fashion in accordance with local Rule 11, which provides that if the court's docket does not reflect any action for one year the clerk shall give notice to the attorneys of record that if no sufficient cause be shown at the call of the civil calendar for the next term, an order of dismissal without prejudice shall be entered by the clerk as of course. As set forth in the affidavit of James P. Heffernan submitted herewith, we appeared at the call of the Dismissal Calendar on March 13, 1970, pursuant to such notice from the clerk, and informed the court that *Raab* and *Less* were companion cases and that discovery had been and was being carried out affecting both cases, and the court directed that we file a written report of progress on June 12, 1970. In accordance with the court's instruction we handed the court a letter on June 12, 1970,copy of which is annexed to said affidavit of Mr. Heffernan, in which we confirmed that *Raab* and *Less* were companion cases, that extensive discovery had already been taken pursuant to notices issued in *Less*,with respect to evidence common to the claims of both plaintiffs, and that we had served a notice to take the deposition of Mr. Charles McDonough in *Raab* for May 29, 1970, which had been adjourned until July 13, 1970, at Mr. McDonough's request because of his trial commitments. We were given no indication of dissatisfaction by the court with this report.

8. The statement at the bottom of page 5 and top of page 6 that "the only action plaintiff took during 1970 was to file a noteof issue in October" is incorrect. In addition

to taking depositions of Charles McDonough in Less in July and October 1970, we took the deposition of Mr. McDonough in Raab on July 13, 1970. Also, we prodded the defendants into taking Mr. Raab's deposition. Attached as Exhibits to said affidavit of Mr. Heffernan are memorandum dated August 20, 1970, of a call from Mr. Heffernan to Mr. McDonough requesting that the defendants get Mr. Raab's deposition taken, and letter from our firm to Mr. McDonough dated September 22, 1970, urging that Mr. Raab's deposition by the defendants be completed as soon as possible.

9. The statements at the beginning of the first full paragraph of page 6 of the decision indicating that plaintiff disobeyed an order of the court requiring the filing of a pretrial statement do not fairly reflect the circumstances. The pro forma order which accompanied the notice of pretrial conference for April 2, 1971, covered both Less and Raab and was directed to all parties, not just the plaintiff. None of the parties filed a pretrial statement with respect to either case, because discovery was not complete. We advised the court that we planned to take depositions of certain officials of Teledyne Inc., a California corporation, and of defendant Himmelfarb, and the defendants indicated that they wanted to take the depositions of David Sweet and Eugene Murphy. The court then issued an order, jointly captioned for both Less and Raab, reflecting this and establishing a proposed time schedule with respect to the completio of such discovery.

10. The statement appears at the middle of page 6 of the decision that in 1972 the case went to the Magistrate for a pretrial conference but "since plaintiff had failed to comply with the order directing the filing of a pretrial statement,

the meeting was adjourned until December 13, 1972". That is not so. The pretrial conference called by the Magistrate on August 17, 1972, was adjourned until December 13, 1972, so that the defendants could complete their discovery, namely, the taking of the depositions of David Sweet and Eugene Murphy. Those depositions were thereafter completed on October 28, 1972, pursuant to notices issued by the defendants on October 14, 1972.

Since the receipt of the court's decision granting the defendants' motion for dimissal, we have reviewed this matter with Magistrate Maxwell, and on the basis of this review we would anticipate that upon a full hearing of the issues presented by the motion for dismissal, and the within motion, Magistrate Maxwell's testimony would establish the following :

(a) That the pretrial conference held before him in August, 1972, was adjourned to December 13, 1972, so that the defendants could complete their discovery, namely the taking of the depositions of Eugene Murphy and David Sweet.

(b) That the conference was adjourned again for two weeks, until December 28, 1972, in accordance with a letter from Mr. Heffernan advising that Mr. Sweet was ill with pneumonia; that on the adjourned date of December 28, 1972, the courts were closed because of the funeral of former President Truman and therefore the conference was adjourned by the Magistrate's office to February 7th, 1973.

(c) That the plaintiffs filed a combined pretrial statement for both *Less* and *Raab* with the Magistrate on February 5, 1973, two days before the pretrial conference, and that Mr. McDonough, representing all the parties except D'Angelo and Himmelfarb, filed a combined pretrial statement for *Less* and *Raab* two days after the conference.

(d) That notwithstanding the wording of the pro forma order as to the filing of a pretrial statement which accompanies notices of pretrial conference, it is not uncommon for the attorneys not to file the statement until after the conference, since it might be determined at the conference that the case is not really ready for a final conference, and the statement would therefore be premature or incomplete, or also that the case might be settled at the conference, making it unnecessary to file the statement at all.

(e) That the obligation to file a pretrial statement falls equally upon the plaintiffs and the defendants.

(f) That from the settlement discussions which took place at the February 7 13, 1973 conference before him, it was the Magistrate's impression that it was the feeling of counsel for all parties that once the *Less* case were resolved the *Raab* case could be readily disposed of along the same lines.

(g) That following the February 1973 conference Magistrate Maxwell forwarded the files in both cases to the court with a report stating that both cases were ready for trial.

(h) That counsel for the plaintiffs

complied promptly and fully with all pretrial matters and proceedings during the Magistrate's involvement with the two actions.

11. The indication at the bottom of page 6 and top of page 7 of the decision that the plaintiffs took no action from September, 1973, until February, 1974, is unfair. During that period it was known to the defendants that we were still awaiting word from them as to whether the Siemer firm was going to be appointed as trial counsel in both the Less and Raab actions. This was a question the defendants had had under consideration since at least the March 13, 1973, pretrial before the court, and despite numerous inquiries to counsel for the defendants, we could not get a definite answer until January 18, 1974, when we were informed by Mr. Hitchcock that Mr. Siemer was going to handle the litigation in place of Mr. McDonough, and we called Mr. Siemer and he confirmed it.

12. With reference to the discussion at the first paragraph of page 9 of the decision concerning the depositions of the Teledyne witnesses and of the defendant, Himmelfarb, there were two valid reasons why the taking of those depositions was deferred until the completion of the plaintiffs' other discovery: 1. It was hoped that the evidence discovered from the depositions of the witnesses available locally would be sufficient to establish the plaintiffs' causes of action in both Less and Raab, without the necessity of taking the depositions of the Teledyne witnesses, who resided in California, and of Mr. Himmelfarb, who resided in Mexico. 2. In the event that it

proved advisable to take the depositions of those parties, their examinations would be in effect trial depositions, since it was unlikely that they would be available here to give live testimony upon trial. Therefore prudence dictated that the discovery from the local witnesses be completed first in order to properly prepare for examinations of the out-of-state witnesses.

From the discovery taken in both Less and Raab through October 1970, plaintiffs were in a position to establish that negotiations between Teledyne and Taber Instrument had been initiated in February 1966, and had led to the consummation of the acquisition in December 1966, and that neither Mr. Less nor Mr. Raab had been informed of those negotiations prior to the acquisitions of their stock in May and June of 1966. However, during discovery the defendants asserted that at the time of the purchase of the stock from Mr. Less and Mr. Raab, the status of those negotiations was so uncertain that failure to disclose them to the plaintiffs did not constitute failure to disclose a material fact. We therefore concluded that it would be advisable to take the depositions of the Teledyne witnesses, if they could be taken here. On October 12, 1971, the court decided in favor of Teledyne's application for a protective order, vacating our examination subpoena served May 5, 1971, holding that although Teledyne was doing business within this jurisdiction and therefore could be required by the court to produce its chairman, Dr. Singleton, here for deposition, the court in the exercise of its discretion would require that his deposition be taken in California.

The plaintiffs were not given the option of taking the depositions of the Teledyne witnesses in Buffalo on condition of paying their plane fare here, as is indicated in the court's decision on the motion for dismissal. Instead, under the prevailing practice and in view of the protective order granted Teledyne, the plaintiffs would have had to pay the expenses to California, and return, with overnight accommodations, of the three defense counsel, Messrs. Hitchcock, McDonough and Boreanaz, as well as our own.

13. The decision indicates, at the beginning of page 10, that almost all of the documents in the two cases were available to the plaintiffs since November 1967. The schedules attached hereto as Exhibit "D", listing the exhibits in these cases, which are made a part hereof, list 165 plaintiffs' exhibits and 39 defendants' exhibits, or 204 exhibits in all, of which 92 were marked and discussed in the depositions taken in 1967, and 102 were marked and discussed in depositions taken in 1968, 1969, 1970 and 1972.

14. The statement at the end of page 10 and beginning of page 11 of the decision, that plaintiffs' attorneys were witnesses to the negotiation of the sale of Mr. Raab's interest, is in error. Plaintiffs' attorneys were witnesses with respect to the negotiation of the sale of Mr. Less' stock but not the Raab stock.

The statement is made at the top of page 11 of the decision that the plaintiffs made no effort to secure trial counsel until shortly before the Less case was set for trial. In fact there was not one day's delay in the progress of the cases to trial by reason of our engagement of trial counsel. On April 29, 1974, at the meeting held between the court and counsel, we appeared with our trial counsel, Mr. Montgomery, and asked for an early trial date. The court was forced to adjourn the proceedings until June 3, 1974, because defendants Taber Instrument and Warren J. Hildebrandt had still not secured substitute trial counsel, although the court had indicated at the meeting in March 1973, that Mr. McDonough should not act as trial counsel because of his status as a witness.

15. The statement at page 14 of the decision that "in the Raab case the defendants have always asserted their readiness for trial" is contrary to the facts.

The Raab and Less cases were always answered by the plaintiffs as companion cases, without objection by the defendants, who never indicated their readiness for trial in either case until the February 1973 conference before Magistrate Maxwell. In addition, at that conference, Mr. Mc Donough, representing all defendants in both cases except D'Angelo and Himmelfarb, stated that it appeared that once the Less case was resolved the Raab case could be readily disposed of; we said we agreed, and the other defense counsel present expressed no disagreement.

The defendants stipulated in open court at the June 1974 meeting that trial of Raab be deferred until after trial of Less.

Defendants' counsel acknowledged of record at the March 19, 1975 meeting before the court that the parties had always considered Less the lead case in the litigation, saying with regard to Raab :

MS. SIEMER " * * * This was a case that was tagging alone with the Less case. Everyone's attention was focused on the Less case. * * * ".

See Exhibit "A" (Transcript March 19, 1975 proceedings) at page 9.

At the March 19, 1975 meeting defendants' counsel stated that defendants were not ready for trial, indicating that she was not satisfied with the discovery which had been taken in the case. See Exhibit "A" at pages 9 and 12.

16. The statement at the middle of page 14 of the decision that "the defendants never delayed proceedings before the court" is in conflict with the record. Examples of such delay attributable to the defendants include the following : despite the court's indication at the March 1973 conference that it would be improper for Mr. McDonough to act as trial counsel in the litigation for any defendant in view of his status as a witness, defendants did not substitute the Siemer firm as counsel for the Taber estate until the spring of 1974, a year later; at the meeting on April 29, 1974 plaintiff's counsel asked for an early trial, but the proceedings were adjourned until June 3, 1974, because Mr. McDonough had not been substituted for as trial counsel for defendants Taber Instrument and Hildebrandt. (See letter to counsel from the Court dated May 1, 1974, attached as Exhibit "E") ; at the adjourned meeting

on June 3, 1974, it was reported that substitute counsel had been secured for Hildebrandt, but not for Taber Instrument, and the proceedings were adjourned until June 24, 1974 ; at that June 3, 1974 meeting we asked for an early trial, and Miss Siemer stated that Edward Siemer would be trial counsel for the Taber estate, and that he could not be ready for trial until October 1974; following settlement of the Less case in early November 1974, the defendants delayed in making known their settlement offer in Raab until January 23, 1975 ; at the March 19, 1975 meeting scheduled at the request of plaintiff to arrange for a trial date, defendants' counsel stated that defendants were not ready and requested leave to take extensive further discovery, as is set forth in the transcript of those proceedings, Exhibit "A" attached hereto.

17. Deponent must respectfully deny the statement which appears toward the end of page 14 of the decision, to the effect that on numerous occasions the court warned that failure to prepare could result in dismissal. Either deponent or my partner, James Heffernan, and sometimes both of us, attended every call of the two cases and every court conference. On none of these occasions at which deponent was present was such warning received.

As set forth in the affidavit of James P. Heffernan submitted herewith, Mr. Heffernan answered the call of the dismissal calendar in March 1970, and informed the court that the reason the docket in Raab did not reflect any activity during 1969, was that it was a companion case with Less, in which extensive discovery had been and was being conducted; thereafter in compliance with the court's order of March 13, 1970, a further written report as to progress in the cases was submitted on June 12, 1970. To the best of deponent's knowledge, information and belief, said explanation and report, and subsequent reports to the court regarding the progress of the proceedings in accordance with the court's continuing supervision of the two cases, did not elicit any warning of possible dismissal.

18. At page 15 of the decision there is the statement that no applications were made by plaintiff to bring defendants to account if they failed to abide by a scheduled date for a deposition taking. As has been shown by the affidavits and exhibits filed on behalf of the plaintiff in opposition to the defendants' motion to dismiss, the proceedings were delayed repeatedly at the request of counsel for one or more of the defendants, especially Mr. McDonough, but concededly without application by plaintiffs to the court for supervision of discovery. However, we did make application to the court for relief with respect to the failure of Mr. Boreanaz to appear or produce his client, Mr. Himmelfarb, for examination pursuant to notice given. When we were unable to obtain compliance after affording Mr. Boreanaz several adjournments at his request, we brought on a motion to strike Himmelfarb's answer, or for other relief, and upon hearing

Mr. Boreanaz' explanation that he had been occupied in other matters, the court excused his extended default, without terms or conditions.

18. In view of the matters brought to the court's attention hereby, and by the affidavits of James P. Heffernan and David E. Montgomery submitted herewith, and under all the circumstances attending this litigation, it would be unjust to permit the said judgment of dismissal to stand, and deprive the plaintiff of the opportunity for a determination of his cause of action on its merits.

19. In any event, it would be inequitable and would amount to a deprivation of due process, to let stand the judgment of dismissal without affording plaintiff a hearing as to the controverted issues raised by the opposing affidavits of counsel for the parties, so that plaintiff may establish such matters through sworn testimony given at such hearing. The granting of such a hearing would be in keeping with the court's own suggestion given at the most recent settlement conference, held some time after the motion for dismissal had been submitted, briefed and argued, that it appeared that it would be unfair to grant the defendants' motion without the benefit of a hearing in order to resolve the questions raised by the record and the affidavits and exhibits.

WHEREFORE deponent prays :

1. That the court vacate and set aside the judgment of dismissal entered herein, and reinstate this cause of action to the civil docket of this court for an early trial.

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

2. That in the alternative, the court grant the plaintiff a full hearing, and reargument, with respect to the issues raised upon the defendants' motion for dismissal and upon this motion for relief from the judgment of dismissal.

3. That plaintiff have such further and other relief as is just and proper.

David L. Sweet

David L. Sweet

Subscribed and sworn to before

me this 15th day of December, 1975

Florian Carl Flier

FLORIAN CARL FLIER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

JUNIA E. RAAB,

Plaintiff,

-v-

CIVIL DOCKET
NO. 1967-190

TABER INSTRUMENT CORPORATION, a New York Corporation; JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, and WARREN J. HILDEBRANDT

CINDY R. TABER and MARINE MIDLAND BANK-WESTERN, Executors of Ralph F. Taber, Deceased,

Defendants.

* *

Proceedings held before the HON. JOHN T. CURTIN, United States District Judge, in Part I, United States Court House, Buffalo, New York, on March 19, 1975.

APPEARANCES:

HEFFERNAN, SWEET & MURPHY, Attorneys for the Plaintiff; DAVID L. SWEET, Esq., of Counsel.

FALK, SIEMER, GLICK, TUPPEN & MALONEY, Attorneys for the Defendant Estate of RALPH F. TABOR; Ms. DEANNA C. SIEMER, of Counsel.

BRENNAN, CALLAHAN, TESSEYMAN, ZELMAN & RUNFOLA, Attorneys for the Defendant BENJAMIN MANASEN; ROSS L. RUNFOLA, Esq., of Counsel.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, Attorneys for the Defendant WARREN J. HILDEBRANDT; VICTOR T. FUZAK, Esq., of Counsel.

Exhibit "A"

THE COURT: In the Raab case, Miss Siemer, Mr. Fuzak, Mr. Runfola, Mr. Sweet, nice to see you all again. Mr. Runfola, you weren't around before.

MR. RUNFOLA: No.

THE COURT: Mr. Zelman was.

MR. RUNFOLA: Arnold Zelman was, your Honor, and I had the unfortunate situation- - -

THE COURT: Does your appearance mean that we are in for trouble?

MR. FUZAK: Where is Mr. Hitchcock.

MR. RUNFOLA: If no money means trouble, your Honor, we are in for trouble.

MS. SIEMER: Mr. Hitchcock is in Florida.

THE COURT: I see. I suppose Mr. Hitchcock is out of this now, right?

MS. SIEMER: I think not, your Honor. He is still committed to the firm to wrap up the D'Angelo matters.

THE COURT: I see.

MR. RUNFOLA: I received a letter from John Adams explaining they have received a letter from the firm.

THE COURT: I see. He sent a copy to everyone and he said his client D'Angelo will not be participating in the pretrial because depositions have been taken of everyone who has or had any knowledge of the Raab sale and there is not a word remotely suggesting that D'Angelo had anything to do with it.

MS. SIEMER: I think that probably fairly characterizes his position.

MR. SWEET: He didn't say he wouldn't come to the trial, did he.

THE COURT: Please?

MR. SWEET: [He didn't go so far as to say he wouldn't come to the trial.

THE COURT: No, he didn't. He didn't say that. I just assumed this was tracked to pretty much the fact picture in the other case or is it different? Of course, we don't have - - -

MR. RUNFOLA: I think pertaining to, may I say, Mr. Manasen there is a difference in fact, your Honor, because Mr. Manasen, or I don't think is claimed and I think is a true statement of fact that none of the stock that emanated from Mr. Raab ever was distributed to Mr. Manasen, so it is a different picture so far as that is concerned.

MS. SIEMER: That's correct, your Honor. This stock was never distributed to anyone.

THE COURT: Certainly we don't have a quorum here. What do you suggest we do in order to get this moving?

MR. SWEET: Your Honor, I had a meeting with Mr. Siemer, Deanne's father and I don't know when it was, a month of two ago, about possibly settling this case and all I can tell you is that we are miles apart on it and I don't see any alternative but to set it down for trial.

THE COURT: So that my thought or my hope that since we settled the other that this one might follow within certain guidelines isn't so.

MR. SWEET: That is what we expected too, your Honor, but it hasn't come to pass.

THE COURT: In the other case the defense had a lot of bad information about the plaintiff there. Is that in this case too?

MS. SIEMER: Yes, your Honor, it is. It is the same kind of a case and the problems that corporation had with this plaintiff are a little bit more directly related to the corporation's business as they related to his expense accounts and travel and certain other expenditures he made on behalf of the company but that is the same issue in this case as there is the same circumstance under which he was discharged and with respect to a settlement it seems to us that it certainly is possible to settle and we have offered to settle with Mr. Sweet based on the same calculation that made in the settlement in the Less case.

The problem here is that the corporation has already paid. According to Mr. Sweet's calculations using the same formula that we used in the Less case of $50 a share, Mr. Raab's holdings were worth $30,000. The corporation has already paid Mr. Raab $23,000 in settlement of this matter and we have the same situation here as we had in Less, the Less case.

There was a settlement of this matter. The coporation paid Mr. Raab a substantial amount and because the amount that the corporation paid Mr. Raab was so close to his claim there isn't a lot of room for difference but we have offered Mr. Sweet the difference.

MR. SWEET: I entirely disagree with what Deanne has just said, but Mr. Raab got $4,800 for his stock and if he had stayed in there the date of closing of the Teledyne deal his stock would have been worth, - under the agreement with Teledyne his stock would have been worth $30,000 and our position is he got $4,800 for his stock and that the profit sharing money that was paid to him out of the profit sharing trust was not from Taber Instrument Corporation but out of a separate trust for the benefit of the employees was entirely unrelated and should not be taken as an offset.

MS. SIEMER: Well, we took it as an offset in the Less case and since Mr. Raab was represented by counsel it is exactly the same situation. He released, - he had a number of claims against the corporation. All of those claims were settled and the stock bought back at the same time. The stock in this case is really a very incidental partof the transaction, unlike Mr. Less who was a major stockholder. Mr. Raab was a very minor stockholder who held only 600 shares of very, - very, - not even a percent of the shares outstanding.

THE COURT: The same general rules apply to him, though, as apply to Mr. Less.

MS. SIEMER: That's correct, and the problem here is the same problem as we had in Less and that is the release was intended to cover all these transactions but the exact wording of the release doesn't and so we are in the same - - -

MR. FUZAK: And there were claims by the corporation against Mr. Raab as well that were settled as I understand it.

MS. SIEMER: That is correct.

MR. SWEET: That is not so. There were no claims by the corporation against Mr. Raab. That is a distinct difference in the two cases. In the Less case you had lawsuits brought by Taber Instrument

Corporation against Mr. Less and his family and a separate count against Mr. Less individually for $50,000, and we heard through all these previous deliberations and discussions that great weight was attached to those lawsuits brought by Taber Instrument Corporation against Mr. Less. We do not have any such case in this Raab situation.

THE COURT: As far as settlement is concerned we also have, although reluctantly, Mr. Hitchcock's client did participate in that other settlement.

MS. SIEMER: That's correct.

MR. SWEET: He didn't contribute any fresh money.

MR. RUNFOLA: Yes, he gave up, I think - - -

MR. FUZAK: Fresh or stale it was money.

MR. SWEET: Well, there was an escrow established against the Less claim and there is no escrow against the Raab claim and part of Mr. D'Angelo's, - Dr. D'Angelo's stock went into that escrow that ultimately was part of the settlement fund.

THE COURT: But you don't have anything now coming from - - -

MR. SWEET: No escrow.

THE COURT: So that would mean a difference in how people participate in the settlement. Mr. Fuzak, you were going to say something?

MR. FUZAK: No. I finished what I was going to say. Thank you.

THE COURT: How long will this take to try?

MS. SIEMER: Well, there is a matter before trial, your Honor, and that is as I have said all along I am not satisfied with the discovery in this case. This was a case that was tagging along with the Less case. Everyone's attention was focused on the Less case. There is very little discovery in this case. It is not adequate with respect to our client. I would expect some additional substantial discovery if this case is going to be trial.

MR. SWEET: We would object to that, your Honor. There is plenty of opportunity for all kinds of discovery. By the time that Miss Siemer's firm got into the case all discovery had been completed and the same, - by the way, there was extensive discovery in the Less case.

THE COURT: Here is the problem the way I look at it. If we go to trial without discovery then what we are going to do is we are going to have a lot of thrashing around and it will take, - who knows, - it certainly will take extra time to try without having discovery. The other thing is this, the present counsel got in the case at a late date, certainly, and also in this case everyone agreed that this case should follow along after the Less case.

We spent a lot of time. You spent a lot of time, everybody else spent a lot of time getting that Less case wrapped up so that I don't think that counsel should be penalized by my order saying, "no more discovery". It is old. I hate to open the file it is so old because the dust begins to pop up but I think that if quickly, expeditiously and reasonably pursued they ought to have discovery so that we can get this decided on the merits.

MR. SWEET: They have had the deposition of Mr. Raab at which Mr. McDonough and all the other counsel conducted that. The other deposition taken in that case was Mr. McDonough's deposition as related directly to that case but all of the discovery pertaining to the Less case insofar as it applied to and covered the transactions between Taber and Taber's representatives and Teledyne, they are extensive and voluminous and it is done and it is in the transcripts.

THE COURT: What do you foresee you need by way of further discovery?

MS. SIEMER: Well, there are two problems, your Honor. One is that one of the parties to the transaction, Mr. [illegible] who represented Mr. Raab has not been deposed.

THE COURT: In other words, he represented him in the negotiations?

MS. SIMER: That's correct. The other parties are dead. Mr. Taber who didn't testify about the Raab transaction but whose deposition was taken in the Less matter is dead, and of course, Mr. McDonough who testified very briefly about it is also dead. If Mr. Sweet is going to maintain they were entitled to that pension money and that pension money is not a settlement for the stock then I am going to have to go into all of Mr. Raab's peccadillos with respect to the corporation we are going to have to depose Miss Driscoll, we are going to have to depose Mrs. Rose, we are going to have to depose Mr. Halverson, all the people who had dealings with Mr. Raab, who helped him make that corporation money depart for purposes for which it was not authorized.

MR. SWEET: Your Honor, I have to object most strenuously to all this. Mr. McDonough conducted, - who was chief counsel for them and he went into all this stuff. They examined them.

THE COURT: The only reason this business is now on the calendar is because I sent a notice out. The only way that other case kept going and was finally disposed of is because I sent a notice out.

MR. SWEET: I called up Mr. Walsh and told him that we had this discussion with Mr. Siemer trying to settle it and we hadn't been able to and he said that he would have you send out the notice. I talked to him. I tried to get the thing on.

THE COURT: That is fine, but the thing is that I believe that because of all the things I said before, late time of counsel getting in, you know, as far as everybody's attention, and I think from a practical matter it should have been focused on the other case because there we were talking about a million dollars and this case by comparison is certainly a very, very small one so I think that even though late discovery ought to go ahead. When, - how long will it take you to do this?

MS. SIEMER: What I would like to do, your Honor, is to serve Mr. Sweet with some interrogatories. I would like to serve him with some requests for admition because I think we can narrow some of the issues and if that is not satisfactory then I would like to go ahead with the depositions.

MR. SWEET: Could I have something on that, your Honor?

THE COURT: Mr. Sweet.

MR. SWEET: On the stipulations already taken are we going to have a stipulation that those depositions are going to be admissable in this case as if taken in this case?

MS. SIEMER: No.

MR. SWEET: All right. Then we will have to make a motion that they be so treated, your Honor.

THE COURT: All right.

MR. SWEET: Because the obviously pertain to the same issues and it was intended to avoid duplication of asking the same questions all over again of everybody with respect to Raab's case, - they were taken at the same time pretty much and we went into extensive detail on the Teledyne negotiations in Less's depositions.

THE COURT: Make your motion and I will consider it.

MR. SWEET: All right.

THE COURT: The thing is whatever you do should be done right away. What is your timetable?

MS. SIEMER: I have a brief before the Court of Appeals which I have seven days in which to write and I am currently trying a case in the District of Columbia which is on in 14 days. I would like 30 days in which to submit the interrogatories.

THE COURT: I think that is reasonable and I know that when you say "30 days" you mean 30 days. Very well. That is what we will do and then if is this also the requests for admitions?

MS. SIEMER: I will serve the interrogatories. As soon as I get the answers I will serve requests for admitions and as soon as I get the answers to those I can tell you whether or not we will need any depositions.

THE COURT: Very well. Thank you all for coming.

* * * * * * * *

I certify that the foregoing is a complete and accurate transcription of my shorthand notes taken herein.

E.F. KNISLEY, Official Reporter, USDC, WDNY.

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

NOTICE OF Pre-Trial Conference D. C. Form No. 18 (Rev. Sept. 1953)

United States District Court

FOR THE

Western District Of New York

Joseph F. Less
v.
Taber Instrument Corp. et al

Junia E. Raab
vs.
Taber Instrument Co. et al

No. Civ-1967-182
Civ-1967-190

TAKE NOTICE that the above-entitled case has been set for Pre-Trial Conference at Buffalo, N.Y., on March 13, 19 73, at 9:30 A.M. Part 2, Hon. John T. Curtin.

Date March 1, 19 73

JOHN K. ADAMS,
Clerk.

By Robert J. White,
Deputy Clerk.

To Heffernan, Sweel & Murphy
1202 Marine Trust Bldg.
Buffalo, N.Y.

Charles J. McDonough, Esq.
930 Walbridge Bldg.
Buffalo, N.Y.

Robert Hitchcock, Esq.
Marine Trust Bldg.
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Harold Boreanaz, Esq.
736 Brisbane Bldg.
Buffalo, N.Y.

Louis Loss, Esq.
Langdell Hall
Cambridge, Mass

Hodgson, Russ, Andrews, Woods & Goodyear
1800 One M & T Plaza
Buffalo, N.Y.

Exhibit B

EXHIBIT "C" consists of the transcripts of depositions taken in Less v. Taber Instrument Corporation, et al, Civil No. 1967-182 and Nash vs. Taber Instrument Corporation, et al, Civil No. 1967-190, which are filed separately .

Exhibit C

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Less v. Taber Instrument Corp., etal PLAINTIFF'S EXHIBITS
Civ-1967-182

Exhibit Number	For Ident.	In Evid.	Description
1			Letter of 7/15/38 re Agreement for 17 shares of TIC stock
2			TIC Directors meetings book
3			Letter of 2/3/65. Less to Taber - offer to sell 1,800 shares of TIC stock
4			Letter of 2/19/65. Taber to Less - calls attention to option under buy-sell agreement.
5			Letter of 4/22/65. Less (& CHH) to TIC - Offer to sell 12,300 shares of TIC
6			Letter of 4/16/65. CHH to TIC - Req. for # of TIC shares and book value.
7			Letter of 4/24/65. From D'Angelo (as Ex. V.P. of TIC) to JPH - Encl. profit sharing plan and advises of # of shares of TIC stock.
8			Letter of 4/28/64. From D'Angelo (as Ex. V.P. of TIC) to J. Less - election to purchase Less stock for "Average Per Share Cost".
9			Letter of 4/30/65. CHH to TIC - Rejects election of 4/28/65.
10			Letter of 5/6/66 [illegible]rell and Manella to Taber and D'Angelo Encl. first draft of agreement.
11			Plan of reorganization and agreement - TIC and Teledyne (Draft).
12			Agreement (TIC and Teledyne) [illegible]/27/66
13			Addendum to Agreement (TIC & Teledyne) 12/22/66.
14			Exhibits attached to Agreement (A-O)

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
15			Pledge Agreement 12/8/66 - TIC, Taber, Manasen, Himmelfarb and D'Angelo
16			Teledyne Agreement of Assumption of Liabilities 12/30/66
17			Affiliates letter of 12/30/66 - B. Manasen
18			Agreement, 5/19/66, to transfer 7,000 shares of TIC to D'Angelo for $10./Sh - signed by Taber as President of TIC.
19			TIC stockholders minute book.
20			Letter of 5/16/66. Teledyne (or Singleton) to TIC (Taber).
21			Letter of 3/28/67. TIC (Hildebrandt) to Bank of America - Encl. Teledyne Cert. for 41,475 sh. with auth. to reissue.
22			Teledyne cert LU 2200 for 41,475 sh.
23			Letter of 1/6/67. MBM&B to Liberty National Bank (signed by Taber, TIC- Himmelfarb and D'Angelo) - Del. 3,525 sh. of Teledyne to be held in accord with Pledge Agreement of 12/8/66.
24			Letter of 4/7/67. TIC (Taber) to Bank of America - Encl. Teledyne cert LU 2254 for 38,075 with instructions to reissue
25			Letter of 4/14/67. Amends letter of 4/7/67.
26			5/16/67 letter. MBM&B to Marine Trust (Lansberry) - Encloses Teledyne cert LU 2509 for 2, 765 shares for Himmelfarb.
27			Teledyne Cert. LU 2254 for 38,975 shares.
28			Letter of 5/16/67. MBM&B to Manasen - confirms conversations about his Teledyne stock.

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
29			Letter of 5/16/67. MBM&B to Hildebrandt - Confirms conversations about his Teledyne stock.
30			Letter of 5/12/67. MBM&B to W. Greatbatch - Excl. Teledyne Cert. for 325 shares.
31			Letter of 5/16/67. MBM&B to R. Halverson - Encloses Teledyne Cert for 109 shares.
32			Letter of 5/16/67. MBM&B to Betty Rhoades - Encloses Teledyne cert for 109 shares.
33			Letter of 5/16/67. MBM&B to Cox & Co. c/o Marine Trust Company - Encloses Teledyne cert for 549 shares (Est. of M. Praker).
34			Letter of 3/1/67. Teledyne (Michos) to Bank of America - Instructions to issue 39,000 shares to TIC and balance to Sara Williams as Ex. of estate of L. Barker.
35			Memo from Marine Trust (Lansberry) re issue of 7,100 TIC shares to Himmelfarb and TIC cert 139 (7,100) to Himmelfarb
36			TIC Cert #140 to D'Angelo - 7,000
37			Letter of 5/31/67. MBM&B to Atty. Ambrusko - Encloses Teledyne certs for 109 and 54 shares.
38			Letter of 5/18/67. MBM&B to attorney A.DeMarie - Numerous remarks concerning D'Angelo and Daycon shares of Teledyne
39			Letter of 5/19/67. Dixon, DeMarie et al to MBM&B - Letter of instructions concerning issuance of D'Angelo and Daycon shares of Teledyne
40			Letter of 5/29/67. DeMarie to M&T Trust Co. - Advises that negotiations are underway with C. McDonough for issuance of Teledyne stock to D'Angelo and Daycon.
41			Letter of 6/1/67. DeMarie to McDonough - Encloses TIC cert B140 for 7,000 shares - demands Daycon stock be substituted for D'Angelo stock under pledge agreement.
42			Letter of 6/5/67. MBM&B to DeMarie - Advises D'Angelo's stock has restrictions and will not be released until so authorized by Teledyne.

Exhibit Number	For Ident.	In Evid.	Description
43			Comparative Financial Statement of TIC 1961-1964
44			Stock record book of TIC (Class B).
45			Stock record book of TIC (Class A).
46			Letter of 1/3/67. MBM&B to Bank of America - Encloses Teledyne cert for 45,000 - Req. 2 cert. (one for escrow)
47			Teledyne cert LU 2074 - 45,000 shares.
48			Promissory note 7/7/66 - To E. Himmelfarb by TIC for $29,000 - check to Himmelfarb 8/26/66 for $29,000. Check voucher.
49			Promissory note to Manasen by TIC 6/3/66 - $45,000. Promissory note to Himmelfarb by TIC 6/3/66 - $100,000.00
50			Promissory note TIC to Manasen 3/3/66 - $45,000 Check to Manasen 8/26/66 - $45,000 Check voucher
51			Check (Manasen) on Banco De Comercio to Taber Inst. $45,000. Check on Banco De Comercio to TIC $100,000 (Himmelfarb).
52			Letter of 4/25/66. MBM&B to TIC - Encloses copy of proposed escrow agreement (Marine Trust). Letter of 4/18/66. MBM&B to Sweet - Encloses second page of release and agreement
53			Pledge and Irrev. Proxy Security Agreement (TIC and Marine Trust) 5/9/66.
54			TIC check to Less for $141,000 (Cancelled check). TIC deposit slips for $141,042.58 and $926.09 Journal entries.
55			Letter of 7/25/66. TIC (Hildebrandt) to MBM&B - Advises of borrowing from Manasen and Himmelfarb.
56			Letter of 5/4/66. MBM&B to TIC - confirms closing of Less deal with complete details

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
57			Letter of 4/25/67. Kaufman to Michos - encloses affiliates letters for Himmelfarb, Manasen (Release of indebtedness letters for Himmelfarb and Manasen)
58			Book containing plan of reorganization and agreements and exhibits TIC and Teledyne
59			Book containing closing documents 1-15.
60			Draft #2 of Plan of Reorganization.
61			Draft #3 of Plan of Reorganization.
62			Contract between Daycon In. Ass.Inc. and TIC 2/-/65.
63			Letter of 4/6/65. D'Angelo (Ex. VP of TIC) to JPH.
64			Option letter dated 6/11/66 - D'Angelo exercises option (Ex.18) to purchase 7,000 shares of TIC at $10. as per agreement of May 19, 1966 (EX. P.18)
65			Letter of 12/7/66. MBM&B to Taber, Manasen and D'Angelo - Encloses copy of pledge agreement.
66			Letter of 12/13/66. D'Angelo to MBM&B - Encloses signed pledge agreement.
67			Letter of 7/12/66. Irell and Manella to Taber and D'Angelo - Encloses 5 copies of plan, etc. - also ref. to pledge agreement.
68			Letter of 7/22/66. Irell and Manella to D'Angelo - Enclosed 2 copies of pledge agreement.
69			Pledge Agreement - Draft 7/21/66 - Unsigned.
70			Pledge Agreement - undated and unsigned.

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
71			Indemnity Agreement - undated and unsigned
72			Letter of 12/8/66 - S. Letts to D'Angelo
73			Letter of 12/30/66 D'Angelo to McDonough - Instructions on issuing Teledyne stock.
74			Summons and complaint - D'Angelo vs. TIC.
75			Draft of Pledge Agreement - Rec'd 11/11/66
76			Letter of 5/3/66 - Bartlo to D'Angelo
77			Letter of 4/1/66. Dr. Singleton to D'Angelo
78			Letter of 5/13/66. Irell and Manella.
79			D'Angelo cancelled check for $70,000 to TIC
80			Letter of 5/24/66 TIC to Teledyne
81			Letter of 5/26/66 TIC to Irell and Manella
82			Letter of 6/9/66 Irell and Manella to D'Angelo
83			Letter of 6/25/66 D'Angelo to attorney Coughly
84			Letter of 7/22/66 Coughly to D'Angelo

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
85			Letter of 6/3/67 Daycon (D'Angelo) to MBM&B
86			Letter of 6/5/-- MBM&B to D'Angelo
87			History sheet - Marine
88			Collateral card
89			Ledger sheet
90			Bartlo telephone memo.
91			Bartlo handwritten notes.
92			Bartlo handwritten notes.
93			Letter from D'Angelo to Bartlo dated March 15, 1966
94			Agreement between Daycon and Bartlo
95			Letter from Irell and Manella to MBM&B 5/24/66
96			Memo of C.McDonough re; meeting with JPH, DLS, EJM 7/14/65
97			Folder with 6 yellow sheets containing memo of C. McDonough
98			Letter from attorney Michos to Liberty Bank 6/11/69 re: stock security escrow

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
99			Letter from HHS&G to McDonough 4/13/66 re: purchase of Less stock
99A			Our copy of P. 99 with notes in margin
100			Letter from MBM&B 4/18/66 re: draft of proposed release
101			Letter to MBM&B 4/20/66 enclosing documents
102			Letter to MBM&B 4/22/66 enclosing documents.
103			Letter from MBM&B to DLS 5/19/66
104			3 page draft (yellow freehand) of release
105			Proposed release from JFL
106			File of MBM&B - 2 yellow sheets and 1 2-page typed document - re: further release
107			Letter from MBM&B to Kaufman 7/20/66
108			" " " " 7/28/66
109			" " " " 9/6/66
110			Letter of 12/13/66 MBM&B to Kaufman
111			Letter from MBM&B to Kaufman 4/18/67

Exhibit Number	For Ident.	In Evid.	Description
112			Letter from MBM&B to Liberty National Bank 10/16/67
113			Letter from Daycon Investors to MBM&B 12/13/66
114			Letter from TIC to MBM&B 4/16/69
115			Letter from D'Angelo to MBM&B 12/13/66
116			Letter of 5/14/69 MBM&B to Attorney Jon Bank.
117			Letter of 5/23/69 Teledyne Inc. (Atty. J. Bank) to MBM&B.
118			Letter of 5/28/69 Hildebrandt to Bank of America
119			10/1/70 Cont. C. McDonough Proposed Redraft of Pledge Agreement (D'Angelo draft of same)
120			Letter fro I and M to MBM&B 7/28/66
121			Letter from I and M to C.J. McDonough 6/9/66
122			Letter from C.J.McDonough to Atty. S. Letts 12/1/66
123			Letter from MBM&B to Kaufman 7/25/66
124			Letter from MBM&B to Kaufman 8/3/66
125			Bill of Sale (unsigned copy) (part of Ex.59? closing documents).

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
126			Letter from MBM&B - opinion letter - closing document 12/30/66
127			Affiliates letter signed by Himmelfarb 12/30/66 Addressed to Teledyne Ex. S. annexed to agreement
128			Letter of 2/16/67 (5 pages) - from MBM&B to Kaufman
129			Receipt signed by Manasen for Teledyne cert. 5/11/67
130			Typewritten sheet of Taber stockholders.
131			Taber stock cert. #B139 - Erwin Himmelfarb
132			Marine Trust sheet - Re: Himmelfarb stock 7,100 shares.
133			Receipt signed by Atty. DeMarie of Teledyne cert for D'Angelo and Daycon
134			Nitice and Inst. to Taber stockholders 4/10/67
135			Letter of 5/12/67 TIC to McDonough
136			Taber stock cert. #B 140 - D'Angelo 7,000 shares 5/16/67
137			Letter of 4/4/67. MBM&B to Bank of America (draft - not mailed) See p. 24
138			Pleadings in Sara Williams case A-S&C 4/20/66 B - Amend S&C 8/17/66 C - Answer to Amend C D - Ans. to Orig. S&C McD - Ok note
139			Two copies of 4 page draft - Escrow Agreement

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
140			3 yellow sheets and C. McDonough notes of agreement.
141			Audited financial statements of TIC 1964 by Ernst & Ernst.
142			Letter from MBM&B to Liberty National Bank and others (extending pledge to end of actions) 12/6/68
143			5 yellow sheets containing notes of C.J. McDonough re: conv. with attorney for Teledyne
144			2 yellow sheets containing notes of C.J. McDonough
145			1 yellow sheet (notes by C.J.McD) 10/20/66 conf. with D. Sweet (see p. 104)
146			Ex. A.0 - signed by Himmelfarb.
147			Teledyne Inc. - Negotiating Permit 5/6/66
148			McD. draft 12/1/66 and addendum (5 Pages)
149			Kaufman changes to McD. draft of addendum 12/6/66
150			Closing memorandum (4 pages) Teledyne-TIC with notes by C.J. McD. 12/30/66
151			Draft of pledge agreement (same as P.69) with notes by C.J.McD.
152			Draft of Pledge Agreement (later draft of P.151)
153			draft of pledge agreement (note 8/8/66 - copy to L. Borins).

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
154			Letter to Atty. Ross Runfola from C.J. McD. enclosing pledge agreement 8/9/66
155			Letter to D'Angelo from C.J.McDonough enclosing pledge agreement - 8/9/66
156			Note 1 white sheet - by C.J.McDonough - re: Teledyne to keep TIC profit sharing.
157			TIC memo signed by R.F.Taber 1/9/67 - to all employees.
158			Pad of 4 yellow sheets with no.

Less v. Taber Instrument Corp., etal
Civ-67-182

DEPT'S
EXHIBITS

Exhibit Number	For Ident.	In Evid.	Description
1			Bill dated August 1, 1960 to Buffalo Launch Club.
2			Letter from Less to Martini & Rossi dated May 14, 1966
3			Letter from Less to Red Farnesworth dated May 19, 1964
4			Letter from Martini & Rossi to Less dated July 2, 1964
5			Letter from Less to Martini & Rossi dated June 29, 1964
6			Letter from Less (handwritten) to Red Petros
7			Notice signed by Ralph Taber dated January 7, 1965
8			Memo from Ralph Taber dated January 13, 1965
9			Diagram
10			Diagram
11			Drawing of a pressure transducer.
12			Diagram
13			Two page Ad for Viatran Pressure Transducer, published 5/15/65
14			Ad for Pressure Transducer published September, 1965

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
15			Letter to Taber from Less dated February 3, 1965
16			Release signed by TIC and Ralph Taber
17			11 checks, 1 charge slip
18			TIC memo dated February 18, 1965
19			15 checks dated 1964
20			18 checks dated 1965
21			Checks dated 1962
22			Viatran business certificate
23			Letter from C,H&H, to TIC dated April 7, 1965
24			Letter from TIC to Heffernan dated April 1, 1965
25			Letter from C,H&H to TIC dated April 5, 1965
26			Letter from C,H&H to TIC dated March 31, 1965
27			Memo dated April 13, 1965
28			Letter from C,H&H to TIC dated April 16, 1965 (Same as Pltf's Exhibit 6)

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

Exhibit Number	For Ident.	In Evid.	Description
29			Letter from TIC to Heffernan dated April 24, 1965 (Same as Pltf's Exhibit 7)
30			TIC to Heffernan (letter) dated May 6, 1965
31			Sweet memo dated November 3, 1966
32			Finder's Fee agreement between Joseph D'Angelo and TIC re Condec
33			(Fairchild Camera document) Telephone message from Joseph D'Angelo to Ralph F. Taber, July 21, 1966.
34			(Fairchild Camera document) D & B report on Fairchild Camera, October 31, 1966
35			(Fairchild Camera document) Copy of page from magazine "Technology Week", July 18, 1966
36			Letter from James P. Heffernan to TIC, April 30, 1965
37			Letter from Ralph F. Taber to Charles McDonough, May 10, 1965

EXHIBITS

Plaintiff's No.	Nature	For Identification
1.	Document	9
2.	Yellow sheet containing handwritten notes by Mr. McDonough	16
3.	Letter from Taber Instrument Company to Mr. McDonough	18
4.	Stock Record Book, Class "A" stock, of Taper Instrument Corporation	21
5.	Duplicate-original of Release by Mr. Raab to Taber Instrument Corporation	24
6.	Letter from Mr. McDonough to Mr. Kaufman, dated 6-20-66, which is also Exhibit 107 in the Less action	24
7.	Stipulation of Discontinuance, dated 5-26-66	27

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

INDEX

Witness	Page
Junia E. Raab:	
Examination by Mr. McDonough	2
Examination by Mr. Hitchcock	56
Examination by Mr. McDonough	60
Examination by Mr. Hitchcock	64
Examination by Mr. McDonough	65

EXHIBITS

Defendant Taber's No.	Nature	For Identification
"A"	Voucher from check issued to Mr. Raab, dated 6-2-66 for the Retirement Account	53
"B"	Voucher from check from Taber Instrument, dated 6-2-66, for payment of the 600 shares of stock	54

* * * * *

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

JOHN K. ADAMS, CLERK

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NIAGARA SQUARE
BUFFALO, N. Y. 14202

May 1, 1974

Mr. David L. Sweet, Atty.
1202 Marine Trust Bldg
Buffalo, N.Y. 14203

Mr. Charles J. McDonough, Atty.
930 Walbridge Bldg.
Buffalo, N.Y. 14202

Mr. Robert M. Hitchcock, Atty.
3400 Marine Midland Center
Buffalo, N.Y. 14203

Mr. Ross L. Runfola, Atty.
1360 Statler Hilton Hotel
Buffalo, N.Y. 14202

Mr. Edward D. Siemer, Atty.
2200 Erie County Bank Bldg.
Buffalo, N.Y. 14202

Mr. Harold J. Boreanaz, Atty.
736 Brisbane Bldg.
Buffalo, N.Y. 14203

Re: Civ-1967-182 Joseph F. Less vs Taber Inst Co, et al
Civ-1967-190 Junia E. Raab vs. Taber Inst Co, et al

Gentlemen:

On April 29, 1974, the court held a meeting with the attorneys for the parties in this action. It appears that Charles J. McDonough, attorney for The Taber Instrument Co&Warren J. Hildebrandt, will be an important witness during the trial of this case. For that reason, in the court's opinion, he will not be able to serve as trial counsel. The court directs that he discuss this matter with his clients as soon as possible so that substitute trial counsel may be obtained.

Another attorney in his firm will be substituted for Mr. Robert Hitchcock.

Further proceedings are adjourned until June 3, 1974 at 2:00 P.M. to set a trial date.

Very truly yours,

JOHN K. ADAMS, Clerk

By: Robert J. White
Deputy Clerk

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

Plaintiff

CIVIL ACTION
1967 - 190

-vs-

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT

Defendants

STATE OF NEW YORK :
ss.
COUNTY OF ERIE :

JAMES P. HEFFERNAN, being duly sworn deposes and says :

1. I am an attorney and member of the firm of Heffernan, Sweet & Murphy, attorneys for plaintiff and am familiar with the facts and circumstances of this action and the action , Joseph F. Less vs. Taber Instrument Corporation, et al, Civil Action 1967-182.

2. I make this affidavit in support of plaintiff's motion for relief from the judgment of dismissal entered November 25, 1975.

3. I have read the affidavits of David L. Sweet, sworn to December 15, 1975, and David E. Montgomery, sworn to December 9, 1975, and deponent concurs with each and every averment made in the aforementioned affidavits.

4. Deponent urges that the Court take into particular account, in considering the instant motion, the fact that

counsel for all the parties, and the court itself, consistently conducted the litigation under the belief and expectation that if the two actions were not to be tried jointly or consolidated, then the Less case , because of its magnitude, was the case in which to thrash out and determine the issues common to both actions. This was specifically acknowledged by Charles McDonough at the February 1973, conference before Magistrate Maxwell, which deponent attended along with Mr. Sweet, and, I am informed, by substitute counsel for Mr. McDonough at the June 1974, meeting before the court, and again at the March 19, 1975, proceedings before the court, as set forth in the transcript of that proceeding.

5. Contrary to the statement on page 14 of the decision that on numerous occasions the court warned plaintiff's counsel that failure to prepare could result is dismissal, deponent was not made aware in the course of this litigation of any such threat of dismissal.

With regard to the appearance of the Raab case on the dismissal calendar in March 1970, I answered the call and informed the court that extensive discovery had been taken in the Less case concerning matters common to Raab, a companion case; the court directed that a progress report be submitted on June 12, 1970, and in compliance therewith I submitted a further written report on that date, a copy of which is attached hereto as Exhibit "1", confirming the relationship of the two cases and advising as to the progress of discovery.

I was under the impression that the court considered said reports satisfactory, since I received no indication to the contrary.

Thereafter, in addition to actively seeking to complete our own discovery we prompted the taking of the deposition of plaintiff Raab by the defendants, as is shown by the memorandum of my telephone call to Mr. McDonough on August 20, 1970 (Exhibit "2" attached hereto) and my letter to him dated September 22, 1970 (Exhibit "3" attached hereto).

6. As to the matter of filing of a pretrial statement, it has been deponent's experience that although the pro forma order which accompanies notices of pretrial states that such a statement is to be submitted in advance of the conference, upon explanation to the court or Magistrate that the case is not ready for final pretrial because of such matters as the taking of additional discovery, the filing of the pretrial statement is postponed, without penalty or prejudice to any of the parties. That is what took place in this litigation, and after the defendants had completed their discovery and the two cases were set down for final pretrial conference in February 1973, pretrial statements on behalf of the plaintiffs and defendants were duly filed.

7. With regard to the matter of our filing of the early notes of issue in both cases, neither opposing counsel nor the court was ever misled by this, for at the ensuing calendar calls we joined with opposing counsel

in informing the court that the cases were not yet ready because of the need of further discovery by both sides.

8. Deponent and Mr. Sweet discussed this matter with Magistrate Maxwell following receipt of the court's decision granting the judgment of dismissal, and deponent agrees that upon a hearing, Magistrate Maxwell's testimony would establish full and diligent compliance of the plaintiffs with pretrial procedures and requirements, all as more fully enumerated in the affidavit of Mr. Sweet submitted herewith.

9. Deponent urges most strenuously that to allow the judgment of dismissal to remain in effect would be a miscarriage of justice and would work undeserved hardship upon the plaintiff Raab , who has a meritorious cause which should be determined on its merits.

James P. Heffernan

Subscribed and sworn to before

me this 15th day of December, 1975

Florian Carl Flierl

FLORIAN CARL FLIERL
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

June 12th,1970

Hon. John T. Curtin
United States District Court
U.S. Court House
Buffalo, New York

Re: RAAB vs. TABER INSTRUMENT CORP., et al
Civil No. 1967-190

Dear Judge Curtin :

This case appeared on the dismissal calendar call on March 13th,1970. We reported to you briefly on the status of the case and you instructed us to file a written report of progress in the case on June 12th,1970.

RAAB vs. TABER INSTRUMENT CORP. is a companion case to LESS vs. TABER INSTRUMENT CORP. Both plaintiffs sue for rescission of the sale of their stock in Taber Instrument Corporation, claiming violations of S.E.C. Rule 10b-5 by reason of failure of the defendants to disclose pending negotiations for the acquisition of Taber Instrument Corporation by Teledyne Corp. at a much higher price than they were paid for their stock.

With respect to the evidence common to the claims of both the plaintiffs, i.e., the circumstances surrounding the negotiations for the acquisition of Taber Instrument Corporation by Teledyne, we have taken extensive discovery by way of examination before trial of Taber Instrument Corporation and its officers and directors pursuant to notices which we issued in the LESS action.

With respect to the negotiations for the purchase of the stock of the plaintiff RAAB, and the affirmative defenses interposed as to his claim, we served a notice to

take the examination before trial of Mr. Charles McDonough who, we are informed, conducted said negotiations on behalf of the defendants, and subpoenaed Mr. McDonough to attend. This examination was scheduled for May 29th, 1970, which was the adjourned date for the completion of his examination before trial in the Less case, which had been adjourned from time to time because of Mr. McDonough's engagement in other matters. Shorly before May 29th, 1970, these examinations were postponed at Mr. McDonough's request because of his engagement in a trial in Supreme Court, Erie County. They were rescheduled for Monday, July 13th, 1970, which Mr. McDonough informed us was the earliest that his other commitments would permit.

The Raab suit is being actively and diligently prosecuted, and we will have both it and the Less suit brought on for trial at the earliest possible date.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By :

JPH:ld

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

MEMO

TO : D. L. SWEET
E. J. MURPHY
FROM : J. P. HEFFERNAN

Re: RAAB vs. TABER, et al

Mr. Raab called me today and said that there is a possibility that he might take a position on the west coast permanently and if it comes about he will be leaving here within the next six to eight weeks.

I called Charlie McDonough and told him that if he wanted to take Raab's deposition, he should do it promptly.

JPH

August 20th,1970

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

September 22, 1970

Charles McDonough, Esq.
930 Walbridge Building
Buffalo, New York 14202

Re: Less vs. Taber, et al
Raab vs. Taber, et al

Dear Mr. McDonough:

This will confirm today's conversation with you in which we rescheduled for Thursday, October 1, 1970, at 10:00 A. M., the taking of Mr. Raab's deposition and the completion of your examination.

As we have advised you earlier, Mr. Raab will very shortly be moving to the West Coast permanently and we cannot assure his presence here for the taking of his examination beyond next week.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS:gs
CC: Robert M. Hitchcock, Esq.
Harold J. Boreanaz, Esq.

Notice of Motion by Plaintiff For an Order, Pursuant to Rule 60(b) F.R.C.P. Vacating Judgment of Dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff — **AFFIDAVIT**

-vs- — Civil 1967-190

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT,

Defendants

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID E. MONTGOMERY, being duly sworn, deposes and says:

1. I am an attorney and a member of the firm of Sacks, Montgomery, Molineaux & Pastore, 437 Madison Avenue, New York, New York, and I was trial counsel for plaintiff in the action Joseph F. Less v. Taber Instrument Corp., et al., Civil Action No. 1967-182 ("the Less case").

2. I make this affidavit at the request of counsel for plaintiff in this action ("the Raab case") in connection with plaintiff's motion for relief from the judgment of dismissal entered on November 25, 1975.

3. I was retained as trial counsel in the Less case in February, 1974. At the next call of the action on April 29, 1974, Mr. Sweet and I indicated that we were ready for the scheduling of a trial date. However, the case was adjourned because the attorney for several of the defendants

had to withdraw because he would be a material witness at the trial. No adjournment was ever requested on the ground that I needed time to familiarize myself with the case. In my opinion, my retention as trial counsel was timely and proper and, to my knowledge, no delay resulted from the timing of my retention.

4. In the course of my preparation of the Less case for trial, I carefully reviewed all of the depositions taken in both the Less and the Raab cases. The depositions in the Less case relating to the negotiations between Teledyne and Taber Instrument (e.g., depositions of Taber, D'Angelo, McDonough, Hildebrandt, Till and Manasen) are crucial to the issues in the Raab case. Furthermore, the depositions in the Less case relating to the negotiations of various parties with Joseph Less for the purchase of his stock (e.g., depositions of Taber, D'Angelo, Hildebrandt, Bartlo, Manasen, McDonough, Less, Till, Murphy and Sweet) are also important and relevant to the Raab case since the sudden interest and activity of the Taber Instrument insiders in buying Less' stock is a strong indication that the Teledyne/Taber Instrument negotiations had indeed reached a significant stage by the Spring of 1966. In my opinion, all of the depositions taken in the Less case are relevant to the issues in the Raab case and are important and necessary to the proper pre-trial preparation of the Raab case.

David E. Montgomery

Sworn to before me this
9th day of December, 1975.

JUDITH A. COHEN
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in Queens County
Commission Expires March 30, 1977

Notice of Appeal From Judgment entered November 25, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

Plaintiff

CIVIL NO. 1967 - 190

-vs-

TABER INSTRUMENT CORPORATION, a New York corporation, CINDY R. TABER and MARINE MIDLAND WESTERN, EXECUTORS OF RALPH F. TABER, DECEASED, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT

Defendants

NOTICE OF APPEAL

Notice is hereby given that Junia E. Raab, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 25th day of November, 1975.

Dated : December 23rd, 1975

HEFFERNAN, SWEET & MURPHY
By: David L. Sweet
Attorneys for Plaintiff
1202 Marine Trust Building
237 Main Street
Buffalo, New York 14203
Telephone (716) 854-5960

TO:

JOHN K. ADAMS
Clerk of the Court

FALK, SIEMER, GLICK, TUPPEN & MALONEY
Attorneys for Taber Instrument Corporation
and Cindy R. Taber and Marine Midland Western,
Executors of Ralph F. Taber, Deceased
2200 Main Place
Buffalo, New York 14202

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for Joseph P. D'Angelo
3400 Marine Midland Center
Buffalo, New York 14203

Notice of Appeal From Judgment entered November 25, 1975.

BRENNAN, CALLAHAN, TESSEYMAN, ZELMAN & RUNFOLA
Attorneys for Benjamin Manasen
1360 Statler Hilton
Buffalo, New York 14202

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
Attorneys for Warren J. Hildebrandt
1800 One M & T Plaza
Buffalo, New York 14203

Notice from court confirming extension of time for defendant to respond to motion to vacate judgment.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
NIAGARA SQUARE
BUFFALO, N. Y. 14202

December 24, 1975

David L. [illegible], Esq.
1202 Marine Trust Bldg.
Buffalo, N.Y.

Ross M. Runfola, Esq.
1300 Statler Hilton
Buffalo, N.Y.

Deanne C. [illegible], Atty.
2200 Main Place Tower
Buffalo, N.Y.

Victor L. Puzak, Esq.
1807 [illegible]
Buffalo, N.Y.

Robert [illegible], Esq.
34[illegible] Marine Midland Center
Buffalo, N.Y.

Re: [illegible]-19[illegible]7-193 Junia [illegible] Haas vs. Taber Instrument Co, et al

Dear Miss [illegible] and Gentlemen:

This is to advise you that plaintiff's motion for an order setting aside and vacating the judgment in the above case, which was returnable Monday, December 29, 1975 will be adjourned until a future date. Judge Curtin has given Miss [illegible] until January 26, 1976 to file a [illegible] in opposition to plaintiff's motion.

Very truly yours,

John K. Adams, Clerk

By: Robert J. White
Deputy Clerk

BEST COPY AVAILABLE

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

In the
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff,

v.

TABER INSTRUMENT CORP., et al.
Defendants.

Civ. No. 1967-190

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT

This is an action brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), seeking equitable relief in the form of recission or, in the alternative, money damages.

The complaint was filed on May 10, 1967. On April 29, 1975, almost exactly eight years later, plaintiff had not yet brought the case on for trial and defendants moved to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure on the grounds that plaintiff had failed to prosecute the action within the meaning of the Rule and that irreparable injury to defendants had occurred during the period of plaintiff's delay.

The Motion to Dismiss was granted on November 25, 1975 and the clerk was directed to enter judgment against the plaintiff, in favor of all the defendants, dismissing the complaint. The clerk entered the judgment on the same day and served a notice of entry together with a copy of the judgment on all parties.

Plaintiff has moved to set aside and vacate the judgment entered in this case and to restore the case to the calendar for trial. Plaintiff bases this motion on the provisions of Rule 60(b) of the Federal Rules of Civil Procedure and the general power of the court to correct errors and do justice. Plaintiff claims that the facts upon which the decision is based could not properly be found by the court because they are in direct conflict with the record, are not supported by the record, and are not established by sworn testimony at a hearing before the court.

Defendants oppose plaintiff's motion on the grounds that: (1) this court lacks jurisdiction to grant the relief requested because of the pendency of an appeal; (2) the issues raised by plaintiff go to the weight and interpretation of the evidence and are appropriate for appeal, not rehearing; (3) plaintiff has not made an adequate showing under Rule 60(b); and (4) plaintiff has not controverted any of the alternate grounds supporting the dismissal.

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

STATEMENT OF FACTS

In order to address the procedural and substantive issues raised by plaintiff's Motion to Set Aside the Judgment, it is necessary to review briefly the procedural context in which the Motion to Dismiss, which resulted in the judgment which plaintiff now challenges, was made, argued and decided.

The court's order dated June 14, 1974 reflected the agreement of counsel that the case entitled Less v. Taber Instrument Corp. should proceed first and that proceedings in this case, Raab v. Taber Instrument Corp., would be deferred until after the Less trial. This scheduling was necessary because many of the same counsel were involved in the Less and Raab matters and it was not practical to have the two matters proceeding simultaneously.

The Less case was settled on November 8, 1974, and by terms of the court's previous order, proceedings in the Raab case were to begin again. At the hearing before the court on the settlement of the Less case, the Raab matter was discussed briefly and defendants indicated that further discovery would be required. The parties recognized that settlement negotiations with respect to the Raab case might be productive, and that some time should be devoted to pursuing a settlement.

On several occasions counsel for some of the defendants urged that plaintiff make a settlement proposal within the framework of the Less settlement. In January, 1975, plaintiff made a proposal that was rejected by defendants. Thereafter, plaintiff's counsel asserts that he contacted the clerk and asked that a pre-trial conference be scheduled before the court. In any event, on February 13, 1975, by notice to all counsel, a pre-trial conference was set for March 19, 1975.

A transcript of the conference proceedings is attached to the Sweet Affidavit of December 15, 1975 as Exhibit A. Following that conference, on April 1, 1975, the court issued an order setting a timetable for completion of discovery.

Defendants reviewed the case in preparation for discovery and came to the conclusion that the long delay in prosecuting the case had prejudiced gravely both discovery and further trial preparation by the defendants. On April 29, 1975, defendants Taber Instrument Corp. and the Estate of Ralph Taber filed and served on counsel for all other parties, a Motion to Dismiss and a Motion to Adjourn Discovery Schedule. The Motion to Adjourn Discovery Schedule was granted by order of the court dated May 1, 1975.

Defendants served, with the Motion to Dismiss, a 37-page memorandum and a nine-page affidavit explaining fully the factual and legal grounds for the Motion to Dismiss. By letters dated May 1, 1975, May 2, 1975, and May 5, 1975, defendants Hildebrandt, Manasen, and D'Angelo joined in the Motion to Dismiss. By order dated May 1, 1975, the court required plaintiff to serve all affidavits and memoranda in opposition to the

Motion on or before May 12, 1975.

When plaintiff's counsel was unable to meet this deadline, counsel for defendants agreed to an extension to and including May 15, 1975, even though, under the terms of the court's order, that extension allowed only two days for defendants to prepare any reply documents.

On May 15, 1975, counsel for plaintiff responded with: (1) a six page memorandum on the factual and legal issues, which had attached two documents as exhibits; (2) a 29-page affidavit by Mr. Sweet setting out facts and attaching nine documents (labelled Exhibits A-I); and (3) a three page affidavit by Mr. Heffernan attaching eight additional documents (labelled Exhibits A-H).

On May 17, 1975, defendants served a 19-page reply memorandum that discussed the legal and factual defense raised by plaintiff to the Motion to Dismiss. This was accompanied by a four-page supplemental affidavit.

A hearing on the Motion was held at 11:00 a.m. on May 19, 1975. At that time, both Messrs. Sweet and Heffernan were heard on behalf of the plaintiff, and Messrs. Hitchcock, Fuzak, Runfola, and Ms. Siemer were heard on behalf of the various defendants. All counsel had ample time to present their arguments.

On May 21, 1975, two days after the oral argument, counsel for plaintiff filed and served two additional reply documents, responding to the arguments made at the hearing: (1) an eight-page affidavit by Mr. Sweet with two additional documents attached; and (2) a five-page affidavit by Mr. Heffernan. Those reply documents were received by the court despite the fact that plaintiff's counsel had not sought permission to submit post-argument written responses. Defendants responded with a three-page letter to the court dated May 21, 1975.

While the Motion was pending, the court convened several further pre-trial conferences in order to review with the parties the possibility of settlement.

The Motion was granted by order of the court dated November 25, 1975 and the judgment was entered on that same date. Copies of these documents were served on counsel for all parties.

On December 16, 1975, three weeks later, counsel for plaintiff filed and served a Motion to Set Aside the Judgment. The two-page Notice of Motion was accompanied by a number of supporting documents: (1) an 18-page affidavit by Mr. Sweet to which were attached 35 pages of documents*/ (labelled Exhibits A-E); (2) a two-page Affidavit of Mr. Montgomery;

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*/ Exhibit C, which apparently contains copies of all the deposition transcripts, is not included in this number.

and (3) a four-page Affidavit by Mr. Heffernan to which were attached three documents[*/] (labelled Exhibits 1-3). Some of the factual assertions included in the Sweet and Heffernan Affidavits and some of the documents attached thereto had not previously been a part of the record.

On December 24, 1975, one day before the expiration of the time period, plaintiff filed a Notice of Appeal of the judgment entered on November 25, 1975. The Court of Appeals for the Second Circuit moved promptly to schedule the appeal. By Notice dated January 7, 1976, (as amended by Notice dated January 16, 1976) the court set the briefing and argument schedule in this matter: the appellant's brief is due on March 17, 1976; the appellees' briefs are due on April 16, 1976; and the oral argument is set for April 26, 1976. By Notice dated January 7, 1976 (as amended) a pre-argument conference has been scheduled for February 9, 1976.

ARGUMENT

As is set out more fully below, plaintiff's Motion to Set Aside the Judgment should be denied because: (1) this court lacks jurisdiction to grant the relief requested because of the pendency of an appeal; (2) the issues raised by plaintiff go to the weight and interpretation of the evidence and are appropriate for appeal, not rehearing; (3) plaintiff has not made an adequate showing under Rule 60(b); and (4) plaintiff has not controverted any of the alternate grounds supporting the dismissal.

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*/ Exhibit 1 is the same as Exhibit H to Mr. Heffernan's Affidavit of May 14, 1975.

I. THIS COURT LACKS JURISDICTION TO GRANT THE RELIEF REQUESTED BECAUSE OF THE PENDENCY OF AN APPEAL.

Plaintiff delayed in filing the Motion to Set Aside Judgment until December 16, 1975, three weeks after the Judgment was entered, even though all the facts on which the Motion is grounded were well known to counsel for plaintiff on the day that the judgment was entered. On December 24, 1975, one day before the time period expired, plaintiff filed a Notice of Appeal.

Plaintiff's self-imposed schedule gave this court only eight days in which to consider the Motion. If plaintiff had filed immediately after the judgment was entered, this court would have had nearly 30 days in which to consider this Motion.

Once the Notice of Appeal is filed, this court surrenders jurisdiction to the appellate court and can no longer act to affect the judgment under Rule 60(b). As Moore points out:

> [T]he general rule is that when an appeal is taken from the district court, the latter court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it buy [sic] the appellate court. Hence during the pendency of an appeal it is generally held that the district court is without power ... to vacate, alter or amend the judgment under Rule 60(b), whether the 60(b) motion is made prior to or after the appeal is taken, except with permission of the appellate court. J. Moore, Federal Practice ¶ 60.30 [2] (1975).

That rule is followed by courts in this Circuit. Earle v. United States, 152 F. Supp. 554 (E.D.N.Y. 1957); Frasier v. Public Serv. Interstate Transp. Co., 254 F. 2d 132 (2d Cir. 1958); Freedman v. Overseas Scientific Corp., 150 F. Supp. 394 (S.D.N.Y., aff'd., 248 F. 2d 274 (2d Cir. 1957); Ritter v. Hilo Varnish Co., 186 F. Supp. 625 (S.D.N.Y. 1960); Daniels v. Goldberg, 8 F.R.D. 580 (S.D.N.Y. 1948), aff'd., 173 F. 2d 911 (2d Cir. 1949).

Plaintiff must move in the appellate court to permit this court to consider the 60(b) motion. The standard used by the appellate court in considering such a motion is quite stringent. It must appear that, if leave is given, the trial court might properly grant the 60(b) motion. E.g. Baruch v. Beech Aircraft Corp., 172 F. 2d 445 (10th Cir. 1949); Zig Zag Spring Co. v. Comfort Spring Corp., 200 F. 2d 901, 907-08 (3d Cir. 1953). Until that motion is made and granted, this court is without jurisdiction to consider this Motion and therefore it should be denied.

II. THE ISSUES RAISED BY PLAINTIFF ARE APPROPRIATE ONLY FOR APPEAL, NOT REHEARING, AND THE APPELLATE COURT HAS ALREADY SCHEDULED A PROMPT HEARING OF THE APPEAL.

Even if this court had jurisdiction, it should deny plaintiff's Motion because the issues raised are appropriate for appeal, not rehearing.

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

The legal grounds for Plaintiff's Motion appear only in paragraph 3 of the Sweet Affidavit which says:

> "The decision of the court upon which the judgment of dismissal is based contains many statements of fact which are either in direct conflict with the record or are not supported by the record. In addition, in arriving at its decision the court has found important facts which are controverted in the affidavits and documents submitted upon the motion for dismissal, without a hearing and the taking of sworn testimony from the various witnesses, as is required for a just and fair determination of contested questions of fact."

That paragraph states only one proposition; that the findings of the court are not supported by the record. Pointing to a conflict between the findings of the court and the facts in the record or a failure by the court to find an evidentiary basis in sworn testimony or by judicial notice are simply alternative ways of expressing the underlying standard that the findings of the court must be supported by the record

A re-examination of the record to determine whether the findings of fact by the court have legally adequate support in the record is one of the basic appellate functions. Plaintiff has pursued this recourse by filing a Notice of Appeal dated December 24, 1975. The Second Circuit has, by Notice dated January 7, 1976 and amended by Notice dated January 16, 1976, already set the briefing and argument schedule in this matter, and the case will be presented to that court on April 26, 1976.

The purpose of a re-hearing is quite different. It is to give the court an opportunity to consider new facts, new law or new circumstances, not considered at the time of the initial decision. This obviates, in some cases, the necessity for a remand by the appellate court for additional fact finding, and gives the trier of fact an opportunity to reach a decision based on all the evidence.

An analysis of the papers in support of the Motion indicates that they are nearly completely directed to a re-argument of facts previously brought before the court rather than an introduction of new facts or circumstances relevant to the decision of the court. Table 1, attached hereto as Appendix A, analyzes each of the 54 assertions of fact set out in the supporting affidavits of plaintiff's counsel. At least 40 of these assertions of fact have been made in nearly exactly the same terms in previous affidavits submitted by Messrs. Sweet and Heffernan. [*/] Of the remaining "new" assertions of fact, all are matters well known to counsel for plaintiff at the time the Motion to Dismiss was argued. [**/]

[*/] Table 1, items numbered 1-14, 16, 18, 24-28, 31-32, 34-41, 45-52, 54

[**/] Table 1, items 15, 17, 19-23, 29-30, 33, 42-44, 53

For example, five of the "new" assertions of fact are plaintiff's counsel's version of the proceedings at various appearances before the court.*/ Another two "new" assertions are descriptions of the form of documents already in the record.**/ Another five items are descriptions of actions taken by plaintiff's counsel themselves.***/

The only "new" matters not previously part of the case are two assertions with respect to practice before this court.****/ Even these are not "new" because each is subject to judicial notice, and thus each is a matter of which the court was aware at the time of the initial decision.

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*/ Table 1, items 15, 17, 22, 44, 53.

**/ Table 1, items 20, 23.

***/ Table 1, items 19, 21, 33, 42, 43.

****/ Table 1, items 29, 30

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

It is evident from the affidavit provided by plaintiff's counsel that they seek only to re-argue facts previously considered by the court because they disagree with the court's interpretation. No new matters of fact or law are presented for this court's consideration. For that reason, the Motion should be denied and plaintiff should be required to pursue his appeal.

III. PLAINTIFF HAS FAILED TO STATE ANY GROUND THAT IS SUFFICIENT TO SUPPORT RELIEF UNDER RULE 60(b).

The affidavits of plaintiff's counsel restate many of the alleged facts that have been urged on plaintiff's behalf with respect to the Motion to Dismiss, and urge that an evidentiary hearing is now required in order to determine whether plaintiff's version of the facts is correct. As is more fully set out below, none of the alleged facts is sufficient, nor are all taken together sufficient to support relief under Rule 60(b). Further, pursuant to Rule 43(e), an evidentiary hearing of the kind urged by plaintiff is discretionary and there was no circumstance surrounding the Motion to Dismiss, most notably any request by plaintiff, suggesting that the court should have exercised its discretion in this regard.

A. The facts asserted by plaintiff's counsel are insufficient under any provision of Rule 60(b).

Plaintiff does not designate with clarity any one of the six provisions of Rule 60(b) under which relief is claimed to be available. A brief inventory of these provisions in relation to the 54 assertions of fact made in support of the plaintiff's Motion indicates that these facts are insufficient to support relief under any provision of Rule 60(b).

(1) mistake, inadvertence, surprise or excusable neglect.

Mistakes of either party with respects to facts asserted or law relied upon could provide the basis for a Rule 60(b) motion. Plaintiff's counsel do not point to any mistake that they made; and their only reference to counsel for defendants is that the version of the facts urged by defendants is different than plaintiff's version. It is the view of some authorities that Rule 60(b)(1) also permits relief from judicial error. E.g. J. Moore, Federal Practice ¶60.22 [3] (1975). However, even under this generous view of Rule 60(b)(1), relief is limited to review for error of law where the precedent has recently been changed by an appellate court and the trial court relied on an erroneous principle of law. E.g. Tarkington v. United States Lines Co., 222 F. 2d 358 (2d Cir. 19[illegible]teen days after the trial court's decision the Supreme Court repudiated the doctrine on which the trial court had relied.) No such changes in the law are cited by plaintiff. Plaintiff does not challenge either aspect of the legal standard: that Rule 41(b) reaches delay by plaintiff even if there is no injury to defendant; and that there is an independent ground for dismissal if injury to the defendant is shown.

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

Plaintiff's counsel steadfastly assert that they were proceeding according to their plan for prosecuting plaintiff's action and that there was no inadvertence or neglect, whether excusable or not, on their part.

No element of surprise is raised.

(2) newly discovered evidence.

Table 1, annexed hereto as Appendix A, analyzes the facts asserted by plaintiff's counsel in their affidavits made in support of the Motion to Set Aside the Judgment. There are 54 such assertions. About 75% of these assertions of fact had been made in almost precisely the same terms in the affidavits of plaintiff's counsel in opposition to the Motion to Dismiss. *See* Table 1, column 3, where the corresponding references to counsel's earlier affidavits are set out. Plaintiff's counsel are merely re-asserting these fact arguments and complaining that the court did not agree with their analysis of the facts.

None of the remaining 14 assertions of fact, that were not set out in earlier affidavits, qualifies as newly discovered evidence. As is pointed out above, these assertions concern plaintiff's version of appearances before this court in this action,*/ plaintiff's description of the form of documents filed in this action, **/ plaintiff's version of actions taken by plaintiff's counsel in this action, [*/] and plaintiff's version of general matters of practice before this court. [**/] All of these matters were well known to counsel for plaintiff at the time the Motion to Dismiss was argued. A newly discovered deficiency in plaintiff's argument before the court with respect to the Motion to Dismiss does not qualify as newly discovered evidence under Rule 60(b)(1).

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*/ Table 1, items 15, 17, 22, 44, 53

**/ Table 1, items 20, 23

(3) fraud

There is no suggestion that fraud of any sort is involved here.

(4) judgment is void

This provision is designed to provide relief from judgments that have been reversed, set aside or as to which enforcement has been enjoined by another court. J. Moore, Federal Practice, ¶ 60.25 (1975). This provision is inapplicable.

(5) judgment has been satisfied, released or discharged.

This provision is inapplicable.

(6) any other reason justifying relief.

This provision is a general residual clause designed to take care of unforeseen contingencies not covered by the specific provisions of clauses 1 through 5. It is used in situations where the person against whom the judgment is taken could not enter a defense due to circumstances beyond his control. It does not apply where the person against whom the judgment is taken appeared, entered a defense, and had a fair opportunity to make a conscious choice with respect to litigation strategy. Compare Klapprott v. United States, 335 U.S. 601 (1949) with Ackermann v. United States, 340 U.S. 193 (1950). Plaintiff cites no fact that puts his situation in this category.

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*/ Table 1, items 19, 21, 33, 42, 43

**/ Table 1, items 29, 30

As is pointed out by Moore: "Like 60(b) generally, clause (6) cannot be used as a substitute for appeal." J. Moore, Federal Practice, ¶ 60.27 [1] (1975). As is pointed out in Section II above, plaintiff's theory that the findings of the court do not have adequate support in the record is one to be presented on appeal, not under Rule 60(b).

B. There is adequate support in the record for the findings of the court.

Plaintiffs make five primary points: (1) the court erred in characterizing its own role in urging plaintiff's counsel on to trial; (2) during a seven-month period, in 1972 and 1973, when this case was before the Magistrate, plaintiff's counsel complied with the Magistrate's orders; (3) in 1974 and 1975 plaintiff did not cause further delay; (4) plaintiff should be excused from any neglect of this case because it is a "companion case" to the Less case; and (5) plaintiff should be excused from any neglect of this case because such neglect comports with "common practice" before this court.

Responding to these arguments is a tedious exercise, since they have all been made before in remarkably similar terms and they do not seem to improve with age. In order to shortcut the litany, the summary Table attached hereto as Appendix A includes as Column 5 a short statement of the rebuttal to each of the 54 factual assertions made by plaintiff's counsel. This rebuttal is summarized below.

(1) the court's characterizations of its role. */

One of the most startling factual arguments advanced by counsel for plaintiff is that the court erred in characterizing its own statements in this case. In the opinion the court finds as a fact:

> "On numerous occasions, the court urged plaintiff's counsel to prepare and warned that failure to prepare could result in dismissal. These warnings were ignored." Opinion at 14.

Plaintiff's counsel does not deny that on numerous occasions this court urged them to prepare, but states in rebuttal:

> "Either deponent or my partner, James Heffernan, and sometimes both of us, attended every call of the two cases and every court conference. On none of these occasions at which deponent was present was such warning received." Sweet Affidavit, 12/15/75, ¶ 17.

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*/ Table 1, items 17, 53.

> "[D]eponent was not made aware in the course of this litigation of any such threat of dismissal." Heffernan Affidavit, 12/15/75, ¶ 5.

Defendants are handicapped in responding to these astonishing assertions by counsel for plaintiff because on some of the relevant occasions only counsel for plaintiff were present and on other such occasions only Mr. McDonough represented defendants. As Mr. McDonough is now dead, defendants are unable to challenge these assertions directly.

However, the circumstances of delay by plaintiff's counsel were certainly sufficiently exasperating to support the court's version of the facts. On two occasions, in 1970 and 1971, the case was eligible for dismissal on grounds of inaction. In both instances, the court permitted the plaintiff to go forward. From 1971 through 1975, on ten separate occasions, plaintiff's counsel failed to comply with or simply ignored an order of the court intended to move the case on for trial.

Those instances are as follows:

1. A Notice dated March 11, 1971 had attached to it a Pretrial Order requiring the submission of a pretrial statement.

   Counsel for plaintiff did not submit the required statement.

   Counsel appeared at the pretrial conference on April 2, 1971, held before the court, and apparently offered the excuse that the pretrial statement had not been submitted because plaintiff's discovery was not complete. Counsel for plaintiff did not thereafter engage in further discovery.

2. An order of the court dated April 6, 1971 recites an agreement of counsel for plaintiff that "two months was sufficient time to take the depositions [of Singleton, Letts and Himmelfarb] and have transcript prepared."

   Counsel for plaintiff failed to meet that timetable, and did nothing until the fall of 1972, some 16 months later, when it was acknowledged to counsel for defendants that no further discovery would be taken. The excuse offered is first that discovery of local witnesses had to be completed, causing delays, and then considerations of the cost of transporting all counsel to California caused abandonment.

3. That same order of the court dated April 6, 1971 states: "Pretrial statement required by order of this court shall be filed not later than June 25, 1971."

   Counsel for plaintiff failed to meet that deadline. The pretrial statement was not filed until February 6, 1973, some 19 months later.

   Counsel for plaintiff offers an excuse to cover the period August, 1972 to February, 1973 (a series of adjournments of the pretrial conference by the Magistrate) but offers no excuse to cover the period June, 1971 to August, 1972, more than 13 months in which plaintiff conducted no further discovery.

4. A Notice dated July 13, 1972 required a pre-trial statement to be submitted at least three days prior to a pre-trial conference on August 17, 1972.

   Counsel for plaintiff failed to submit any pretrial statement.

   The excuse offered is that discovery was not complete. However, at this time, plaintiff's discovery was complete. Only defendants' discovery was not complete.

5. A Notice dated November 17, 1972 had attached to it a Pretrial Order requiring the submission of a pretrial statement by the plaintiff. The Notice requires the submission of the statement at least three days prior to the pretrial conference date. Rescheduling of the pretrial conference several times extended that time deadline into early February.

    Counsel for plaintiff failed to meet that deadline.

    The excuse offered is that the filing was only one day late on this occasion.

6. The same Pretrial Order attached to the Notice dated November 17, 1972 contains six paragraphs stating the requirements to be met by the pretrial statement.

    The pretrial statement submitted by counsel for plaintiff failed to meet completely all but one of those paragraphs; and fails to make any attempt to meet (or offer any explanation for not meeting) two of those paragraphs. No joint statement of facts is provided and no statement setting forth efforts to arrive at a joint statement is provided as an alternative. No statement of factual and legal issues is provided. No list of or description of exhibits is provided. No resume of the testimony of witnesses is provided. No memorandum dealing with legal problems is provided.

    No excuse is offered.

7. An order of the court dated June 14, 1974, required counsel for plaintiff to prepare an exhibit list setting forth all exhibits to be used by plaintiff at the time of the trial.

    Counsel for plaintiff failed to meet this deadline.

    No excuse is offered.

8. At the pre-trial conference on March 19, 1975, the court directed counsel for plaintiff to submit promptly a motion that the depositions in the _Less_ case be treated as if they had been _taken_ in the _Raab_ case in order that this issue could _be decided_ in an orderly fashion. (_See_ Sweet Affidavit, 12/15/75, Exhibit A _at_ p. 14).

   Counsel for plaintiff failed to make that motion.

   No excuse is offered.

9. An order of the court dated April 1, 1975 required plaintiff to respond to interrogatories from defendants by June 1, 1975. On May 21, 1975 defendant D'Angelo submitted a single interrogatory.

   Counsel for plaintiff failed to meet the deadline for responding to this interrogatory. Counsel for defendant renewed the demand for an answer at the pretrial conference on July 17, 1975. Counsel for plaintiff has, to date, not responded.

   No excuse is offered. None is available. The Motion to Adjourn Discovery Schedule filed by defendants Taber Instrument Corporation and Estate of Ralph F. Taber on April 29, 1975 applied only to the time in which to _serve_ interrogatories. Plaintiff has _never been_ excused from the requirement that previous interrogatories be answered.

10. An order of the court dated May 1, 1975 required counsel for plaintiff to respond to defendants' Motion to Dismiss on or before May 12, 1975.

    Counsel for plaintiff failed to meet this deadline. The response and supporting affidavits were not filed until May 15, 1975 and the affidavits of Messrs. Sweet and Murphy were not even prepared until May 14, 1975.

    No excuse is offered.

Counsel for plaintiff have succeeded in delaying this case not only through their own inaction, but in spite of persistent attempts by the court to move the case on for trial. */ Plaintiff's counsel would be hard pressed to point to a court order issued during this time period and applicable to them that they complied with in a full and timely fashion. Under these circumstances, the warnings by the court with respect to possible dismissal seem well-founded.

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*/ There is another item of circumstantial evidence bearing on this matter. On March 20, 1974, plaintiff's counsel wrote to the court and stated:

> "We are well aware that these cases are overdue for trial and wish to avoid any further preliminary skirmishes, such as litigation over the question of consolidation, which will further delay getting them set down for trial"

(Sweet Affidavit, 5/14/75, Exhibit F at p. 2). It seems likely that admonishments from the court were the source of this awareness on the part of counsel for plaintiff.

(2) The Magistrate's involvement [*/]

Plaintiff's counsel look to the Magistrate to buttress in some manner their assertions that despite the fact that it has taken eight years to dispose of this case, no responsibility for this passage of time should be laid at plaintiff's door. They assert that, if called to testify, the Magistrate would affirm that:

> "Counsel for the plaintiffs complied promptly and fully with all pretrial matters and proceedings during the Magistrate's involvement with the two actions." Sweet Affidavit, ¶ 10.

This assertion is not very compelling or convincing in light of the circumstances in which it is made: (1) this evidence was available to plaintiff at the time of the argument of the Motion to Dismiss and was not presented at that time; (2) the documents and the affidavits of plaintiff's counsel indicate to the contrary; and (3) even if taken as true, the short period of time that the case was before the Magistrate would not counterbalance the delay by plaintiff that went before or that came thereafter.

Mr. Sweet's Affidavit of May 14, 1975, at paragraph 8, states:

> "In preparing this affidavit, I spoke with

[*/] Table 1, items 7, 24-34, 44-45

> Magistrate Maxwell on May 8th, 1975, and after reviewing his file he informed me that his notes show that we reported both cases ready for trial at the February 7, 1973 conference, that he so marked them and accordingly referred them to the Court for the scheduling of trial date."

Any evidence with respect to the Magistrate's view of counsel's prompt and full compliance during the proceedings before the Magistrate was available to plaintiff at the time of argument on the Motion to Dismiss. Any failure by counsel to present fully this evidence is not a basis for relief under Rule 60(b).

As chronicled in subsection (1) above, the documentary evidence indicates that plaintiff's counsel failed to comply with virtually every court order that affected them in the post-1971 period. This includes several of the orders outstanding during the period when the Magistrate handled the case. Plaintiff's counsel now asserts that despite this documentary evidence, there was really no failure to comply. However, one searches all of the affidavits in vain to find any assertion that plaintiff's counsel applied for or received any extension of time or other waiver of compliance with any of these orders. It appears that plaintiff's counsel simply ignored these time deadlines and substantive requirements and is now asserting that since the court and the Magistrate never sought to impose sanctions, there was a de facto approval or permission granted. That argument cannot be given credence.

(3) Plaintiff's actions in 1974 and 1975 [*/]

Plaintiff's counsel continues to argue that they have been diligent since 1974 and therefore the effects of their earlier delay are overcome. Defendants dispute the version of the facts presented by plaintiff with respect to the 1974-1975 time period. See Table 1, col. 5, items 1, 35, 43, 48, 51. Most notable is plaintiff's assertion that appointment of trial counsel was not a cause of delay. Plaintiff's counsel misses the point. Since 1967 plaintiff's counsel has been or should have been aware that the appointment of outside legal counsel was necessary. Plaintiff's own pretrial statement dated February 6, 1973 identified both Messrs. Sweet and Murphy as principal witnesses at trial. At the pretrial conference on March 13, 1973, Mr. Sweet again acknowledged that his firm could not try the case. Yet Mr. Montgomery was not retained as trial counsel until 1974 when it became plain that the court was going to insist on an early trial. This delay in

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[*/] Table 1, items 1, 2, 35, 43, 48-52

appointing trial counsel is consistent with a lack of any effort by plaintiff's counsel to bring this case on to trial.

Even if plaintiff's counsel had been diligent in 1974 and 1975, which defendants dispute, these actions cannot excuse previous delays. This point was argued and briefed extensively with respect to the Motion to Dismiss. See Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at p. 35. Plaintiff should not be permitted to re-argue this point now.

(4) The relationship between the Less and Raab cases.*/

This point has been briefed and argued extensively in connection with the Motion to Dismiss. See Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss; Reply Memorandum of Defendants Taber Instrument Corporation and the Estate of Ralph F. Taber in Support of Motion to Dismiss.

Two additional points might be made. Plaintiff had at least two opportunities to litigate the issue of whether and to what extent the Less and Raab cases were related and failed to pursue either.

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*/ Table 1, items 3-10, 14-18, 20, 22, 23, 28, 31, 34, 36-41, 44-47

On February 20, 1974, plaintiff's counsel filed a Notice of Motion for Consolidation with a supporting affidavit. Defendants responded forcefully. See Affidavit of Charles McDonough dated February 18, 1974 (for defendants Taber Instrument Corporation, Taber, Manasen and Hildebrandt); Affidavit of Harold Boreanaz dated March 18, 1974; Memorandum of Points and Authorities of Defendant Estate of Ralph F. Taber in Opposition to Motion to Consolidate. Plaintiff withdrew the motion.

At the March 19, 1975 pretrial conference the defendants expressed their view that the deposition transcripts taken in the Less case could not be used in the Raab case because the two cases were not sufficiently related. Plaintiff's Counsel challenged that assertion and stated that a motion would be filed so that the issue could be litigated. The Court directed that this motion be made in a timely fashion. See Sweet Affidavit 12/15/75, Exhibit A at p. 14. The motion was never filed.

Plaintiff's reluctance to litigate this issue directly controverts the confidence with which the disposition is advanced in prose form.

In addition, the plaintiff's assertion that the relationship between the Less and Raab cases was recognized by counsel for defendants is controverted by counsel for defendants. See Affidavit of Robert M. Hitchcock at p. 2 (attached hereto as Appendix B); Affidavit of Harold J. Boreanaz at ¶ 4 (attached hereto as Appendix C); Affidavit of Victor T. Fuzak at ¶ 10 (attached hereto as Appendix D); Affidavit of Edward D. Siemer at ¶ 7 (attached hereto as Appendix E); and Affidavit of Ross L. Runfola at ¶ 5 (attached hereto as Appendix F). Plaintiff's assertion with respect to Mr. McDonough's statements are hearsay and should be disregarded because Mr. McDonough cannot be called upon to refute them.

(5) "Common practice" with respect to notes of issue*/

Plaintiff's counsel seeks to explain the filing of notes of issue in 1967 and 1968 by referring to "common practice" before this Court. See Sweet Affidavit, ¶ 7; Heffernan Affidavit, ¶ 3.

The notes of issue filed by plaintiff's counsel in 1967 and 1968 contained the representations: "Trial desired at Term of Court commencing November 14th, 1967." and "Trial desired at Term of Court commencing November 12th, 1968." The logical conclusion to be inferred from the filing of these notes of issue is that in 1967, after plaintiff had completed the depositions of all of the defendants in this action, plaintiff's counsel considered this case ready or nearly ready for trial.

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*/ Table 1, items 11, 12, 13, 14

And that appears to be the case. After 1968 plaintiff took the deposition of only two persons, Messrs. Bartlo and McDonough, and pursued no other discovery. The evidence with which plaintiff was prepared to go to trial in 1976 is almost entirely the same evidence that plaintiff had collected by the end of 1968.

Plaintiff's excuse is that the filing of the notes of issue bear no relationship to readiness for trial because the case would normally be carried over from term to term for completion of discovery. That excuse is without substance. See Affidavit of Victor T. Fuzak at ¶ 15 and Affidavit of Harold J. Boreanaz at ¶ 8.

C. There is no requirement of or necessity for an evidentiary hearing.

Plaintiff points to the lack of an evidentiary hearing to consider disputed matters of fact as one of the grounds for this Rule 60(b) motion. That ground is frivolous for three obvious reasons: (1) Rule 43(e), which governs the receipt of evidence on motions, does not require such a hearing and expressly permits the matters such as the Motion to Dismiss to be considered on affidavits; (2) plaintiff has waived any right to request an evidentiary hearing by not making that request prior to the hearing on the Motion to Dismiss; and (3) such an evidentiary hearing is unnecessary because all of the principal persons who could have given testimony have submitted affidavits which can be weighed by the court.

Rule 43(e) provides:

> "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

The Motion to Dismiss was a matter particularly appropriate for a hearing on affidavits since it involved only procedural steps taken by lawyers, and the affidavits to be considered by the court were all from lawyers.

If plaintiff believed that it was desirable to have an evidentiary hearing at which oral testimony would be taken, such a request could have been directed to the court at any time from April 29, 1975, when the Motion was filed by defendants, to May 19, 1975, when the oral argument was heard by the court. No such request was made. It is unseemly indeed for plaintiff to now assert that he would have been better off had such an evidentiary hearing been held.

Further, such an evidentiary hearing is unnecessary. The summary Table attached hereto as Appendix 1 contains a column 4 which identifies the source of proof as to each of the 54 assertions of fact made by counsel for plaintiff in support of the Motion to Set Aside Judgment. There are five such sources of proof: (1) documents that are before the court and which speak for themselves; (2) matters as to which the court can take judicial notice; (3) lawyers who are now participating in this case (and Mr. Boreanaz, who participated in the Less case); (4) Mr. McDonough, now deceased; and (5) Messrs. Walsh and Maxwell.

There is plainly no need for an evidentiary hearing with respect to sources of proof (1), (2) and (3). An evidentiary hearing cannot reach Mr. McDonough. That leaves the possibility of taking evidence from Messrs. Walsh and Maxwell, and that is unnecessary. The assertion of fact made by plaintiff's counsel as to which Mr. Walsh would testify is inconsequential. See Table 1, item 2. The assertions of fact as to which Mr. Maxwell would testify are susceptible of proof by documents and the affidavits of lawyers who participated in the Less and Raab cases. See Table 1, items 7, 31, 33, 45. In addition, even if an evidentiary hearing were held, and Mr. Maxwell did testify as plaintiff's counsel represents he would, this evidence with respect to seven months out of an eight-year period of delay would not change the weight of evidence supporting the court's decision on the Motion to Dismiss.

IV. PLAINTIFF'S REQUEST FOR RELIEF CONTESTS ONLY ONE OF THE TWO ALTERNATIVE GROUNDS ON WHICH THE MOTION TO DISMISS WAS GRANTED.

The decision of the court with respect to the Motion to Dismiss rests on two independent grounds: Plaintiff's failure to prosecute, and irreparable injury to defendants through the passage of time. Plaintiff's Motion to Set Aside Judgment contests only the findings with respect to failure to prosecute. Plaintiff apparently concedes the irreparable injury to defendants to proceed in this matter. Since this alternate ground would survive, even if plaintiff's attack on the first ground were successful, the relief requested cannot be granted.

CONCLUSION

For the reasons stated above, plaintiff's Motion to Set Aside Judgment should be denied.

Respectfully submitted,

FALK, SIEMER, GLICK, TUPPEN &
MALONEY
2200 Erie County Savings Bank Bldg.
Buffalo, New York 14202

January 24, 1976

TABLE 1: FACT ANALYSIS

Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
1. In fact, I learned for the first time on January 23, 1975, that the Raab case could not be settled, when I received defendants' offer from Edward Siemer	¶ 4	Sweet Affidavit 5/14/75, ¶14	Sweet Siemer	Contra: Hitchcock Affidavit p.3 ; Fuzak Affidavit ¶16 ; Siemer Affidavit ¶10 ; Runfola Affidavit ¶ 8 ;
2. I called Deputy Clerk Richard Walsh of this Court the next day, January 24, 1975, informed him that settlement negotiations in Raab carried on since settlement of the Less case had been unavailing, and asked him to so advise the court and have the case set down for a final conference to arrange for trial and marking of exhibits, and Mr. Walsh said he would do so.	¶ 4	Sweet Affidavit 5/14/75, ¶ 14	Sweet Walsh	Inconsequential
3. The Raab and Less actions were always treated by all parties as companion cases.	¶ 5	Sweet Affidavit 5/14/75, ¶ 3; Heffernan Affidavit 5/14/75, ¶ 4 Sweet Affidavit 5/20/75, ¶ 8	Sweet Hitchcock Boreanaz Runfola Fuzak McDonough	Contra: Hitchcock Affidavit p. 2; Fuzak Affidavit ¶ 10; Boreanaz Affidavit ¶ 4 ; Runfola Affidavit ¶ 5 ; Siemer Affidavit ¶ 4 ; Opposition to Plaintiff Motion to Consolidate, 3/22/74

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
4.	At calendar calls and pretrial conferences they were consistently answered and dealt with as companion cases, without any indication to the contrary from counsel for the defendants.	¶ 5	Sweet Affidavit 5/14/75, ¶ 3	Sweet Hitchcock Boreanz McDonough	Contra: Hitchcock Affidavit p. 2; Boreanz Affidavit ¶ 4 There was no need for any defendant to do anything until the plaintiff moved to consolidat the two cases. At that point all defendants provided convincing indications to the contrary and the motion was withdrawn.
5.	The court invariably scheduled pretrial conferences for both actions simultaneously, and often the court's notices and orders were jointly captioned, as in the joint notice of pretrial conference in both cases on March 13, 1973.	¶ 5	Sweet Affidavit 5/14/75, ¶¶ 7,8 9,11,12,14	Document	Many of the same counsel were involved in these two cases and this sche uling of conferences wa convenient for the court and counsel. Such scheduling is irrelevant to the substance of either case.
6.	Each of the pretrial statements filed by counsel for the plaintiffs and defendants was a joint statement for both *Less* and *Raab*, and so captioned.	¶ 5	Sweet Affidavit 5/14/75, ¶¶ 3,8 Sweet Affidavit 5/20/75, ¶ 8	Document	This appears to be a matter of form rather than substance, where it occurs, in view of the opposition of all defendants to the motion to consolidate. The pretrial statement filed by Boreanaz is captioned *only* in the *Less* case;

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
					further, the pretrial statement filed by McDonough refers only to the Less action; and the pretrial statement filec by Hitchcock contains separate sections discussing the Less and Raab actions in differen terms.
7.	Counsel for the defendants confirmed at meetings before the Magistrate and the court that they viewed Less as the lead case and that it should be resolved first, in the expectation that Raab could then be disposed of along similar lines.	¶ 5	Sweet Affidavit 5/14/75, ¶ 8 (Contains a different version limiting this representation to McDonough, who was not counsel for all defendants)	Sweet Hitchcock Boreanaz Maxwell McDonough	Contra: Hitchcock Affidavit p. 3; Boreanaz Affidavit ¶ 5.
8.	Quote from transcript March 19, 1975.	¶ 5	Sweet Affidavit 5/14/75, ¶ 14	Document	The references by Siemer and the court to the Raa case as following the Less case were reference to scheduling, not to substance.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
9.	[T]he discovery as to the efforts of insider D'Angelo and his agent Mr. Bartlo, to acquire the 14,100 shares owned by Mr. Less is clearly relevant to the question of whether the Teledyne-Taber Instrument negotiations were serious enough to require their disclosure to both Mr. Less and Mr. Raab.	¶ 6	Sweet Affidavit 5/20/75, ¶ 8 *See also* Motion to Consolidate 2/14/74, and Opposition to Motion to Consolidate 3/22/74	Document	Defendants would have objected to the introduction of any such evidence in the *Raab* case on the grounds of relevance. Dr. D'Angelo had no part in the Raab transaction. *See* Hitchcock Affidavit pp. 3-4.
10.	This evidence would serve to refute the defense asserted by the management of Taber Instrument that they had no reason to consider the Teledyne negotiations to be of material importance, since they concededly knew that D'Angelo had been handling those negotiations on behalf of Taber Instrument.	¶ 6	Sweet Affidavit 5/20/75, ¶ 8 *See also* Motion to Consolidate 2/14/74 and Opposition to Motion to Consolidate 3/22/74	Document	Defendants would have asserted that there were substantial reasons for acquiring the *Less* stock that were entirely independent of the Teledyne transaction, therefore the mere existence of the *Less* transaction would *not* refute any defense in the *Raab* case.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
11.	The indication at the middle of page 5 of the decision that by filing notes of issue in 1967 and 1968, the plaintiff certified that the case was ready for trial does not reflect the actual practice then observed in this court.	¶ 7	Heffernan Affidavit 5/20/75 ¶ 3	Judicial notice	Contra: Boreanaz Affidavit ¶ 8; Fuzak Affidavit ¶ 15; The obvious inference from the filing of the notes of issue is that plaintiff's counsel was either ready for trial or nearly so and did not expect that extensive discovery remained. This was borne out over the years as relatively little discovery was accomplished in eithe the Less or Raab cases after 1968. Plaintiff's counsel simply delayed in finishing discovery and bringing the case on for trial.
12.	The form of note of issued used did not contain a statement of readiness for trial.	¶ 7	Heffernan Affidavit 5/20/75, ¶ 3	Document	The notes of issue contain the representation by plaintiff as follows: "Trial desired at Term of Court commencing November 14,1967" and "Trial desired at Term of Court commencing Nov.12,1968"
13.	[I]t had long been common practice for the court to permit cases to be placed on the calendar by the filing of such notes of issue and thereafter to be put over the term for such reasons as further discovery.	¶ 7	Heffernan Affidavit 5/20/75, ¶ 3	Judicial notice	Contra: Boreanaz Affidavit ¶8 Fuzak Affidavit ¶ 15; See No. 11 above.
14.	At the call of the Less and Raab cases following the filing of the notes of issue in 1967 and 1968, we informed the court that the two cases were companion cases, and that discovery was in progress which would have to be completed before trial, and no defendant said otherwise.	¶ 7	Heffernan Affidavit 5/20/75, ¶ 3	Sweet Hitchcock Boreanaz McDonough	Contra: Hitchcock Affidavit p.2; Boreanaz Affidavit ¶ 4. See Nos. 3,4 above.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
15.	[W]e appeared at the call of the Dismissal Calendar on March 13, 1970, pursuant to such notice from the clerk, and informed the court that Raab and Less were companion cases and that discovery had been and was being carried out affecting both cases.	¶ 7	[New]	Sweet	Discovery was hastily arranged in the Raab case shortly thereafter to prevent dismissal. One short 27-page transcript was produced in a deposition of McDonough.
16.	[W]e handed the court a letter on June 12, 1970.	¶ 7	Heffernan Affidavit 5/14/75, Exhibit H.	Document	This was required by order of the court filed March 13, 1970.
17.	We were given no indication of dissatisfaction by the court with this report.	¶ 7	[New]	Sweet	The report in this lette that discovery had been and was being carried ou was only marginally accu ate. No discovery had been conducted for more than four months prior to this time and the onl discovery completed afte that date were two brief depositions of McDonough.
18.	In addition to taking depositions of Charles McDonough in Less in July and October, 1970, we took the deposition of Mr. McDonough in	¶ 7	Sweet Affidavit 5/14/75, ¶ 5	Document	It is important to note here that where plaintiff's counsel intended that a deposition be taken in the Raab case, it was so captioned.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
19.	[W]e prodded the defendants into taking Mr. Raab's deposition. Attached as Exhibits to said affidavit of Mr. Heffernan are memorandum [sic] dated August 20, 1970, of a call from Mr. Heffernan to Mr. McDonough requesting that the defendants get Mr. Raab's deposition taken, and letter [sic] from our firm to Mr. McDonough dated September 22, 1970, urging that Mr. Raab's deposition by the defendants be completed as soon as possible.	¶ 8	[New]	Documents	It is apparent from the exhibit offered that plaintiff's counsel's reason for "prodding" th defendants into taking Mr. Raab's deposition wa not to move the case for ward but to save Mr. Raab the expense of returning from California if defendants noticed his deposition in Buffalo after he moved.
20.	The pro forma order which accompanied the notice of pretrial conference for April 2, 1971, covered both Less and Raab and was directed to all parties, not just the plaintiff.	¶ 9	[New]	Document	Plaintiff's reference to a "pro-forma" order is curious since it seems t imply that the order nee not be obeyed. Plaintiff does not dispute his failure to file a pre-trial statement in accordance with this order. Any default by the defendants does not excuse the default of the plaintiff.
21.	None of the parties filed a pretrial statement with respect to either case, because discovery was not complete.	¶ 9	[New]	Docket file	This excuse does not obviate the fact that plaintiff failed to comply with a court order. Further, the statement is inaccurate. Onl defendants' discovery wa incomplete. Plaintiff never took any further discovery

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
22.	We advised the court that we planned to take depositions of certain officials of Teledyne, Inc., a California corporation, and of defendant Himmelfarb, and the defendants indicated that they wanted to take the depositions of David Sweet and Eugene Murphy.	¶ 9	[New]	Sweet Hitchcock Boreanaz McDonough	There is a compelling inference, in light of plaintiff failure to take these depositions, that these representations were made to the court without adequate consideration by counsel or without complete disclosure of contingent plans to abandon this discovery if it could not be accomplished easily.
23.	The court then issued an order, jointly captioned for both *Less* and *Raab*, reflecting this and establishing a proposed time schedule with respect to the completion of such discovery.	¶ 9	[New]	Document	This order notes that couns for plaintiff agreed that t months would be sufficient time in which to complete these depositions. It was acknowledged by counsel tha these deponents were not in the jurisdiction when the schedule was set.
24.	The pretrial conference called by the Magistrate on August 17, 1972, was adjourned until December 13, 1972, so that the defendants could complete their discovery.	¶ 10	Sweet Affidavit 5/14/75, ¶ 7	Document	The reason that the pre-tri conference had to be adjourned was that plaintiff' counsel had first delayed and then apparently abandoned discovery with respec to Teledyne and Himmelfarb. Defendants were ready to complete their discovery as soon as plaintiff's counsel completed his announced plans to take furthe depositions. Plaintiff's counsel abandoned attempts at further discovery but di not so inform defendants until the fall of 1972. (cont.)

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
24.	(cont.)				Promptly thereafter, defendants discovery was completed. Defendants were delayed in completing this discovery by a request for an adjournment by plaintiff's counsel, which the Sweet Affidavit fails to disclose. See Hitchcock Affidavit pp.6-8
25.	[T]he conference was adjourned again for two weeks, until December 28, 1972, in accordance with a letter from Mr. Heffernan advising that Mr. Sweet was ill with pneumonia.	¶ 10	Sweet Affidavit 5/14/75, ¶ 8	Document	Delay due to plaintiff's counsel.
26.	[O]n the adjourned date of December 28, 1972, the courts were closed because of the funeral of former President Truman and therefore the conference was adjourned by the Magistrate's office to February 7th,1973	¶ 10	Sweet Affidavit 5/14/75, ¶ 8	Document	Inconsequential
27.	That the plaintiffs filed a combined pretrial statement for both Less and Raab with the Magistrate on February 5, 1973, two days before the pretrial conference.	¶ 10	Sweet Affidavit 5/14/75, ¶ 8	Document	Plaintiff's counsel failed to comply with the Notice which required this pre-trial statement to be filed three days before the conference; and failed to comply with four of the six substantive requirements of that order as to what the pretrial statement was to contain.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
28.	[M]r. McDonough, representing all the parties except D'Angelo and Himmelfarb, filed a combined pretrial statement for Less and Raab two days after the conference.	¶ 10	Sweet Affidavit 5/14/75, ¶ 8	Document	Defendants' default, if any, does not excuse plaintiff's failure to obey the outstanding court order. Plaintiff's counsel took no steps to secure defendants' compliance.
29.	[I]t is not uncommon for the attorneys not to file the statement until after the conference.	¶ 10	[New]	Judicial notice	The fact that it is not uncommon, even if true (which defendants dispute) does not constitute compliance with a valid court order.
30.	The obligation to file a pretrial statement falls equally upon the plaintiffs and the defendants.	¶ 10	[New]	Document	Even if defendants were in default (which defendants dispute) this would not excuse plaintiff's default.
31.	[F]rom the settlement discussions which took place at the February 13, 1973 conference before him, it was the Magistrate's impression that it was the feeling of counsel for all parties that once the Less case were resolved the Raab case could be readily disposed of along the same lines.	¶ 10	Sweet Affidavit 5/14/75, ¶ 8	Maxwell Hitchcock Boreanaz McDonough	Contra: Hitchcock, Affidavit p. 3; Boreanaz. Affidavit ¶ 5. See No. 7 above.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
32.	[F]ollowing the February 1973 conference Magistrate Maxwell forwarded the files in both cases to the court with a report stating that both cases were ready for trial.	¶ 10	Sweet Affidavit 5/14/75, ¶ 8	Document	
33.	[C]ounsel for the plaintiffs complied promptly and fully with all pretrial matters and proceedings during the Magistrate's involvement with the two actions.	¶ 10	[New] Note: Sweet Affidavit 5/14/75, ¶ 8 indicates Mr. Sweet conferred with the Magistrate on 5/8/75 in preparing his Affidavit of 5/14/75 and this new material could have been included in that prior affidavit.	Documents Maxwell Sweet Hitchcock Boreanaz McDonough	The documents indicate otherwise. However, the Magistrate's involvement was limited to the period between July 13,1972 and February 13,1973 (only seven months); and even if counsel for plaintiff responded to the Magistrate's schedule, this does not relieve plaintiff from the consequences of the delay prior and subsequent to this seven-month period.
34.	During that period it was known to the defendants that we were still awaiting word from them as to whether the Siemer firm was going to be appointed as trial counsel in both the Less and Raab actions.	¶ 11	Sweet Affidavit 5/14/75, ¶¶ 9, 10	Sweet Hitchcock Boreanaz McDonough	Contra: Hitchcock Affidavit p. 10; Siemer Affidavit ¶ 10. "Awaiting" seems to be a typical posture for plaintiff's counsel.
35.	[D]espite numerous inquiries to counsel for the defendants, we could not get a definite answer until January 18, 1974, when we were informed by Mr. Hitchcock that Mr. Siemer was going to handle the litigation in place of Mr. McDonough, and we called Mr. Siemer and he confirmed it.	¶ 11	Sweet Affidavit 5/14/75, ¶ 10	Sweet Hitchcock Boreanaz McDonough	See # 34 above.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
36.	It was hoped that the evidence discovered from the depositions of the witnesses available locally would be sufficient to establish the plaintiffs' causes of action in both Less and Raab, without the necessity of taking the depositions of the Teledyne witnesses, who resided in California, and of Mr. Himmelfarb, who resided in Mexico.	¶ 12	A somewhat different explanation of this problem is given in the Sweet Affidavit of 5/14/75, ¶¶ 5,6.	Sweet Documents	The depositions of all "local" witnesses except Bartlo were completed in 1968, and no move was made to take the Teledyne or Himmelfarb depositions until 1971. (Mr. Bartlo had nothing to do with either the Teledyne or Himmelfarb transactions). Counsel's "hope" does not account for this delay.
37.	In the event that it proved advisable to take the depositions of those parties, their examinations would be in effect trial depositions since it was unlikely that they would be available here to give live testimony upon trial.	¶ 12	Sweet Affidavit 5/14/75, ¶ 5 (evident that Singleton and Kaufman would not voluntarily come to Buffalo).	Sweet	*See* # 36 above.
38.	However, during discovery the defendants asserted that at the time of the purchase of the stock from Mr. Less and Mr. Raab, the status of those negotiations was so uncertain that failure to disclose them to the plaintiffs did not constitute failure to disclose a material fact. We therefore concluded that it would be advisable to take the depositions of the Teledyne witnesses, if they could be taken here.	¶ 12	Sweet Affidavit 5/14/75, ¶ 5	Deposition transcripts Sweet	See # 36 above. This is not an uncommon defense in this type of action and should have been anticipated by plaintiff's counsel in 1967 when the complaint was filed.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
39.	The plaintiffs were not given the option of taking the depositions of the Teledyne witnesses in Buffalo on condition of paying their plane fare here, as indicated in the court's decision on the motion for dismissal.	¶12	Sweet Affidavit 5/14/75, ¶ 6	Federal Rules Judicial notice of court's order Sweet Fuzak Hitchcock McDonough	Plaintiff was given the option of taking Mr. Himmelfarb's deposition in Buffalo if plaintiff bore the expense of his attending here. See Sweet Affidavit, 5/14/75, ¶ 6
40.	Instead, under the prevailing practice and in view of the protective order granted Teledyne, the plaintiffs would have had to pay the expenses to California, and return, with overnight accommodations, of the three defense counsel, Messrs. Hitchcock, McDonough and Boreanaz, as well as our own.	¶ 12	Sweet Affidavit 5/14/75, ¶ 5; Sweet Affidavit 5/20/75, ¶ 3	Protective order Judicial notice as to practice Sweet Hitchcock Boreanaz Fuzak McDonough	Contra: Boreanaz Affidavit ¶ 9 Fuzak Affidavit ¶ 4 Federal Rules of Civil Procedure, Rule 45 (d)
41.	204 exhibits in all, of which 92 were marked and discussed in the depositions taken in 1967, and 102 were marked and discussed in depositions taken in 1968, 1969, 1970 and 1972.	¶ 13	Sweet Affidavit 5/14/75, ¶ 13; Heffernan Affidavit 5/14/75, ¶ 5 Docket file	Documents	All of the documents were available in 1967 and 1968 if plaintiff's counsel had moved expeditiously to complete discovery. The documents discovered in 1967 were documents of primary importance. Some of the documents marked in the later depositions were duplicates of those marked earlier, and many were of little relevance.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
42.	Plaintiff's attorneys were witnesses with respect to the negotiation of the sale of Mr. Less' stock but not the Raab stock.	¶ 14	[New]	Deposition transcripts Sweet	This can no longer be established since the death of Mr. Ness.
43.	In fact there was not one day's delay in the progress of the cases to trial by reason of our engagement of trial counsel.	¶ 14	[New]	Docket file Sweet	It is not delay by reason of engagement of trial counsel that is important, but the proof of delay and lack of readiness for trial by plaintiff in that trial counsel was not even appointed until May, 1974, when the case had first been put on the trial calendar in 1967. Plaintiff's own pretrial statement dated February 6, 1973 identifies both Messrs. Murphy and Sweet as principal witnesses at trial. At the pretrial conference on March 13, 1973, Mr. Sweet again acknowledged that his firm could not try the case.
44.	The Raab and Less cases were always answered by the plaintiffs as companion cases without objection by the defendants, who never indicated their readiness for trial in either case until the February, 1973 conference before Magistrate	¶ 15	[New]	Sweet Hitchcock Boreanz McDonough	Contra: Hitchcock Affidavit pp. 8-9;

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
45.	[A]t that conference Mr. McDonough, representing all defendants in both cases except D'Angelo and Himmelfarb, stated that it appeared that once the *Less* case was resolved the *Raab* case could be readily disposed of; we said we agreed, and the other defense counsel present expressed no disagreement.	¶ 15	Sweet Affidavit 5/14/75, ¶ 8	Sweet Hitchcock Boreanz Maxwell McDonough	*Contra*: Hitchcock Affidavit p. 3 Boreanz Affidavit ¶ 5 *See* Nos. 7,31 above
46.	The defendants stipulated in open court at the June 1974 meeting that trial of *Raab* be deferred until after trial of *Less*.	¶ 15	Sweet Affidavit 5/14/75, ¶ 12	Sweet Siemer Hitchcock Boreanz Runfola Fuzak McDonough	Irrelevant. *See* Boreanz Affidavit ¶ 10; Fuzak Affidavit ¶ 14; Runfola Affidavit ¶ 7; Siemer Affidavit ¶ 8.
47.	Quote from record (March 19, 1975)	¶ 15	Sweet Affidavit 5/14/75, ¶ 14	Document	*See* No. 8 above
48.	[D]efendants did not substitute the Siemer firm as counsel for the Taber estate until the spring of 1974, a year later;	¶ 16	Sweet Affidavit 5/14/75, ¶ 11	Document	*Contra*: Siemer Affidavit ¶ 2-3

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
49.	[T]he proceedings were adjourned until June 3, 1974, because Mr. McDonough had not been substituted for as trial counsel for defendants Taber Instrument and Hildebrandt.	¶ 16	Sweet Affidavit 5/14/75, ¶ 11	Document	The delay from the pretrial conference on April 29, 1974 to the next conference on June 3, 1974, was only 35 days.
50.	[A]t that June 3, 1974 meeting we asked for an early trial, and Miss Siemer stated that Edward Siemer would be trial counsel for the Taber estate, and that he could not be ready for trial until October 1974;	¶ 16	Sweet Affidavit 5/14/75, ¶ 12	Sweet Siemer Judicial notice of statements before the court.	The court indicated a possible September trial date. The October 15, 1974, trial date involved an inconsequential delay of no more than 30 days.
51.	[T]he defendants delayed in making known their settlement offer in Raab until January 23, 1975;	¶ 16	A somewhat different version appears in the Sweet Affidavit 5/14/75, ¶ 14	Sweet Siemer Runfola Hitchcock Fuzak	Contra: Siemer Affidavit ¶ 10; Hitchcock Affidavit p. 3; Runfola Affidavit ¶ 8; Fuzak Affidavit ¶ 16. See No. 1 above
52.	[A]t the March 19, 1975 meeting scheduled at the request of plaintiff to arrange for a trial date, defendants' counsel stated that defendants were not ready and requested leave to take extensive further discovery.	¶ 16	Sweet Affidavit 5/14/75, ¶ 14	Sweet Siemer Judicial notice of statements before the court.	This statement was also made at the June 3, 1974 pretrial conference; and at the hearing before the court in November 5, 1974. See Sweet Affidavit 5/14/7 ¶ 14.

	Excerpt from Sweet Affidavit Alleging Fact	Affidavit Paragraph	Prior Assertion of Same Fact	Source of Proof as to Fact	Rebuttal as to Asserted Fact
53.	Either deponent or my partner, James Heffernan, and sometimes both of us, attended every call of the two cases and every court conference. On none of these occasions at which deponent was present was such warning received.	¶ 17	[New]	Sweet Heffernan Judicial notice of statement of the court.	This case was considered for dismissal twice, in 1970 and 1971, for inaction. Thereafter, from 1971 through 1975, plaintiff's counsel of ten separate occasions failed to comply with a court order intended to move the case forward to trial. These circumstances, plus the passage of time from 1967 to 1975, make it most likely that such warnings were given.
54.	[W]e did make application to the court for relief with respect to the failure of Mr. Boreanz to appear or produce his client, Mr. Himmelfarb, for examination pursuant to notice given.	¶ 18	Sweet Affidavit 5/14/75, ¶ 6	Document	This is irrelevant because Himmelfarb was not a defendant in the Raab case and the taking of his deposition in the Less case could not have affected the Raab case.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff,

vs.

Civil 1967-190

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

ROBERT M. HITCHCOCK, being duly sworn, deposes and says:

For many years prior to May 8, 1967, the date this action was instituted, I was a member of the firm of Phillips, Lytle, Hitchcock, Blaine & Huber and its predecessor firms, and in charge of its Litigation Department. I continued as a member of said firm through June 30, 1974, and was employed by it thereafter through December 31, 1974, when I retired. I am now listed on the firm letterhead as "of counsel". I have had complete and active charge of this case since its inception.

I make this affidavit in opposition to plaintiff's motion

APPENDIX B

to vacate the judgment herein entered November 25, 1975.

The motion is supported by the affidavit of David L. Sweet, Esq., although there are also affidavits of Messrs. Heffernan and Montgomery which, I submit, add nothing to the Sweet affidavit.

Apart from nit-picking at the November 25, 1975 decision of Hon. John T. Curtin, and re-asserting earlier denials, the Sweet affidavit sets forth what I can but refer to as "the Sweet facts", all of which he knew when his affidavits were submitted in opposition to the motion to dismiss for delay (now nearly nine years) in plaintiff's prosecution of this action.

The Sweet affidavit further demonstrates that Mr. Sweet is incurably allergic to actual facts. The clearest example occurs at pps. 2, 3, 5, 6, 9, 13 and 16 (on some pages more than once) where he refers to Less and Raab as "companion cases." I do not know what he means by that term. All that is companionable about the two cases is that they were instituted on the same date by the same counsel, and that some of the defendants in Less are also defendants in Raab. I have never treated them in any way as involving anything else; having throughout rejected any suggestion that the issues of fact or law were the same in both.

Mr. Sweet never suggested to me during the period 1967 through 1973 that he intended to move to consolidate these cases. If such a suggestion had been made at any hearing or pre-trial conference, I would have objected, because, as appears below, both the factual and legal issues were markedly different.

I have throughout firmly refused to contribute anything to any Raab settlement. I have never confirmed any expectation on the part of anyone that if the Less case were settled, the Raab case could be disposed of along similar lines, as regards any participations by Dr. D'Angelo. The only reason I contributed to the Less settlement was that Dr. D'Angelo was a party, along with T.I.C.-Taber and Himmelfarb in pledging $300,000 ($100,000.00 each) of Teledyne stock when Teledyne acquired T.I.C. assets in December 1966. The pledge provided, inter alia, that if any of the said parties was held liable in the Less action each would contribute pro rata up to the value of that stock. I have always believed that Dr. D'Angelo had a good defense in that action because he had nothing to do with the negotiations resulting in the sale of T.I.C. assets (he had tried and failed to purchase the Less stock for himself), and, as Taber testified, subsequent to April 30, 1965, (no negotiations between T.I.C. and Teledyne were had until after February 3, 1966) Mr. McDonough alone handled all negotiations relating to the sale of the Less stock (Taber deposition August 3, 1967, pp. 187-190); and because, as Dr. D'Angelo testified, he fully advised Less in the spring of 1966 that there were negotiations taking place between T.I.C. and Teledyne, and that Less scoffed that there was any likelihood at all that Taber would ever sell his company (D'Angelo deposition November 9, 1967, pp. 416, 417, 456-459, 482). However, my analysis of the law, as it has been developing over the nine years that this case has been pending, and the facts indicated a substantial possibility that the Estate of Ralph Taber or Taber Instrument Corporation would be held liable, in which event Dr. D'Angelo would lose his $100,000 stock pledge even though he won the litigation. Further, he would have incurred substantial legal fees in the process, which he could not afford. I, therefore, advised Dr. D'Angelo to contribute the proceeds, viz., the then value of his pledge shares (approximately $53,000.00), less his attorneys' fees of approximately $23,000.00 to the $460,000.00 Less settlement. This was done, his contribution amounting to approximately $30,000.00

The aforesaid indemnity agreement was given to cover any liability arising from the sale of Less stock - not a word therein regarding the sale of Raab stock - and the indemnity agreement was signed six months after Raab sold his stock.

The actual facts, well known to Mr. Sweet, are that Dr. D'Angelo had nothing whatsoever to do with any negotaitions resulting in the sale of Raab's stock to T.I.C. Raab testified that his attorney, Mr. Ness, negotiated in his behalf for the sale (Raab deposition, October 1, 1970, p. 56); that the only relationship he had with Dr. D'Angelo with respect thereto was "early in 1965" when Dr. D'Angelo "indicated that he thought he could get what I paid for my stock" (Id. pp. 59, 60). Mr. Sweet prevented development of Raab's knowledge of the negotiations with Mr. Ness (now deceased) advising him not to testify as to any conversations with Mr. Ness in that they "are confidential communications between lawyer and client, which is privileged." (Id. pp. 50, 51). Mr. McDonough testified, and produced his memoranda in confirmation, that it was he who negotiated with Mr. Ness (McDonough deposition, July 13, 1970, pp. 7-12). Both of these depositions (Raab and McDonough) were captioned in the Raab action alone.

Dr. D'Angelo's talk "early in 1965" was at least eight months before there was any thought of negotiating with Teledyne, and Mr. Sweet well knows such to be the fact. The record is replete to the effect that the first mention of possible acquisition of T.I.C. by Teledyne was February 3, 1966. At page 11 of his affidavit Mr. Sweet lapses into accuracy when he states "... plaintiffs (in October 1970) were in a position to establish that negotiations between Teledyne and Taber Instrument had been initiated in February 1966 ..." (Emphasis mine).

It is conclusive, therefore, that when Dr. D'Angelo talked with Raab in the spring of 1965 there were no negotiations to disclose, and no one knows it better than Mr. Sweet.

On various occasions, I, and on one occasion Mr. Cordes of my office, asked Mr. Sweet to dismiss the Raab action vs. Dr. D'Angelo, citing the above facts plus Dr. D'Angelo's financial plight. Mr. Sweet, not deigning to discuss the facts, refused. I had Mr. Cordes submit a single interrogatory to Mr. Sweet asking that plaintiff state every fact which he intended to present at the trial to establish liability on the part of Dr. D'Angelo. At the pre-trial conference on July 17, 1975, I again requested

Mr. Sweet to answer that interrogatory and pointed out that the answer was overdue. To date, Mr. Sweet has not given that interrogatory so much as the cold respect of a passing glance.

In the Raab action, neither Mr. Sweet nor anyone else has ever sought Dr. D'Angelo's testimony.

There is not a word of testimony that Dr. D'Angelo up to the time this action was instituted had had any knowledge that Raab had sold his 600 shares to T.I.C.

There is no wonder, therefore, that I never considered the two cases as companionable by any sense of the term.

Moreover, Mr. Sweet recognized that the issues in the two actions were different. He made a motion for a consolidated trial and then withdrew it when the opposition thereto established beyond doubt that the issues were so disparate that such a trial would encompass such confusion as to amount to chaos. He withdrew his motion by letter to the Court, dated March 20, 1974.

Throughout his affidavit Mr. Sweet states, suggests and implies that the delays in this nine year-old case were not occasioned by his firm. (Id. pp. 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16).

There was a pre-trial on April 2, 1971. Again Mr. Sweet lapses into a semblance of accuracy. He swears that on that date:

> "We advised the Court that we planned to take the deposition of Teledyne or certain officials of Teledyne Inc., a California corporation, and of defendant Himmelfarb, and the defendants indicated that they wanted to take the depositions of David Sweet and Eugene Murphy." (p. 7).

On that occasion Mr. Sweet made it clear that those "planned depositions" would take place in California and Mexico. I said that I intended to take the depositions of Messrs. Sweet and Murphy and would do so immediately upon plaintiffs' attorneys advising that their discovery was completed. The Court agreed that such arrangement was proper.

What nonsense it is for Mr. Sweet to swear (p. 10.):

> "There were two valid reasons why the taking of those depositions (Teledyne witnesses and Himmelfarb) was deferred until the completion of plaintiffs' other discovery: 1. It was hoped that the evidence discovered from the depositions of the witnesses available locally would be sufficient to establish the plaintiffs' causes of action in both Less and Raab without the necessity of taking the depositions of the Teledyne witnesses, who resided in California, and of Mr. Himmelfarb, who resided in Mexico."

Plaintiff never thereafter conducted any "other discovery", took no further depositions from local witnesses or anyone else, and there is nothing in the record to show that Teledyne witnesses or Himmelfarb had ever heard of Raab prior to April 2, 1971.

Mr. Sweet's office and mine were in the same building. I saw him on various occasions subsequent to April 2, 1971, and asked when he was going to complete his discovery - that the cases were growing beards -. No definite answer was made. Finally on, or the day before September 19, 1972, Mr. Sweet told me that his discovery was complete, that he was not going to take any Teledyne or Himmelfarb depositions. Pursuant to my said assurance to the Court nearly 18 months earlier, on September 19, 1972, I noticed the depositions of Messrs. Sweet and Murphy for October 14, 1972, a date that Mr. Sweet and I had agreed upon.

Bearing date October 13, 1972, Mr. Heffernan wrote to all counsel and to Magistrate Maxwell that the said depositions "have had to be adjourned because Mr. Murphy was called out of town unexpectedly and are now scheduled for . . . October 21 . . ."

Mr. Murphy's deposition was taken on Saturday, October 21, 1972, and Mr. Sweet's on October 28, 1972.

DURING THE PRECEDING SOME 19 MONTHS NOT A SINGLE DEPOSITION WAS TAKEN, AND THAT DELAY IS ATTRIBUTABLE SOLELY TO PLAINTIFF.

At all times after October 28, 1972 I was ready for trial. In fact I could have been ready for trial within days after plaintiff completed his discovery, which was prior to April 2, 1971.

Again, with regard to Mr. Sweet's intimations that any delay was due to defendants, the fact is that from 1970 on, at virtually every meeting of counsel and the Court, both in open court and in chambers, I repeated time and again, in substance, that these cases should have been tried years ago. On May 15, 1974, having previously advised the Court and counsel that our partnership agreement required my retirement on June 30, 1974, I wrote to the Court with copies to all counsel. Referring to the sudden death of Mr. Runyan, one of our partners, and the problems of distributing his work load, I wrote that I was staying on until December 31, 1974. My letter concluded:

> "I can try it (Less) anytime during June or July or between September 15 and December 31. In the hope and expectation that at the conference on June 3 a trial can be set to begin within those dates, we are not reassigning the case to other trial counsel."

Thus, in the light of all the foregoing Mr. Sweet cannot accurately contend that the defendants (plural) who include Dr. D'Angelo, were responsible for plaintiff's inordinate and inexcusable delay in prosecuting this case.

Time and again in his affidavit Mr. Sweet refers to actions of defendants (plural), whereas the fact is that all the defendants who, of course, include, Dr. D'Angelo, did not participate. (Sweet affidavit, pp. 2, 3, 7, 8, 10, 11, 12, 13, 14, 15, on some pages more than once.)

My case was weakened materially by the death of Mr. McDonough. He was by far, the most significant actor in both cases. During his deposition, time after time he refused to answer questions or disclose relevant papers claiming attorney-client privilege. He was my age and it never occurred to me that he would not be available at the trial. As a matter of strategy I then made no issue of his privilege claims. This was deliberate on my part. I wanted him on the stand for the jury to observe his refusals, if repeated, and for the Court to rule thereon. In my opinion his privilege claim was baseless. Moreover he represented T.I.C. and all its directors and could easily have ascertained their position as to waiving the privilege, as Dr. D'Angelo waived it when Attorney Bartlo testified. I wanted to question Mr. McDonough as to any efforts he made to place the matter of waiver before his clients and what advice he gave them with respect thereto. I intended to develop these facts fully at the trial. Mr. Sweet asserts that there were "numerous inquiries" by counsel for plaintiff to counsel for defendants during the period from March 13, 1973 to January 18, 1974 about substitution of counsel for the Taber estate. I have no recollection or record of "numerous inquiries" to me during that period. Further, I know of no affirmative action taken by plaintiff's counsel during that period to expedite a trial.

In summary: Mr. Sweet presents no "facts", by his understanding of the term, on this motion that were not available to him and should have been presented in opposing the motion to dismiss. His sole present claim is that the Court erred in its decision. What he is now doing is attempting to utilize this motion to submit new "facts" as a substitute for appeal. I respectfully submit that he should not be permitted to do so.

I apologize for the length of this affidavit. I am unable to shorten it and still present the actual facts, and cite the record in support of them, in opposition to "the Sweet facts".

WHEREFORE, I respectfully pray that this motion be denied.

Sworn to before me this
day of January, 1976

Notary Public

Robert M. Hitchcock

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

v.

TABER INSTRUMENT CORP., et al.,

Defendants

Civ. No. 1967-190

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

HAROLD J. BOREANAZ, first being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and a member of the law firm of Boreanaz, NeMoyer & Baker.

2. In September, 1967, I appeared in the action entitled Less V. Taber Instrument Corp., Civ. No. 1967-182 as counsel for defendant, Irwin Himmelfarb.

3. Mr. Himmelfarb is not a defendant in the action entitled Raab v. Taber Instrument Corp., Civ. No. 1967-190.

4. I have never treated the Less and Raab actions as related cases or "companion cases" because my client has never had any interest in the Raab case. I opposed the motion to consolidate these cases because, in my opinion, the cases did not have common questions of law or fact, particularly with respect to my client.

5. I have appeared or been represented at calendar calls and pre-trial conferences in the Less case. To my knowledge,

APPENDIX C

it has never been represented on behalf of Mr. Himmelfarb that if the Less case could be resolved first, the Raab case could be resolved along similar lines. My client Mr. Himmelfarb had no interest in a settlement of the Raab case.

6. I was present or was represented at each of the depositions in the Less case. I had no understanding that the depositions taken in the Less case were also being taken in the Raab case.

7. On May 5, 1971, the plaintiff in the Less case noticed the deposition of my client Mr. Himmelfarb. As my client resided in Mexico and travel to Buffalo would have been burdensome to him, I advised him not to appear. On October 12, 1971, counsel for plaintiff in the Less case moved to compel Mr. Himmelfarb's appearance in Buffalo. That motion was withdrawn by counsel for plaintiffs on or about November 1, 1971. Counsel for plaintiff in the Less case never seriously sought to take Mr. Himmelfarb's deposition in Mexico although we did talk of the possibility always within the framework of who was to pay for the expense to the best of my knowledge. Mr. Himmelfarb had nothing to do with transactions between Mr. Raab and the Taber Instrument Corporation.

8. I have been practicing before the United States District Court for the Western District of New York since 1956. I am not aware of any "common practice" during the period 1967 to 1972, relative to the filing a note of issue pending proceedings of a pre-trial nature.

9. I am unaware of any "prevailing practice" during the period 1967 to 1971 that would have required counsel for plaintiff

in the Less case to have paid my expenses in connection with a journey to California if the plaintiff had taken depositions in California. The order of the court dated October 12, 1971, providing for depositions in California made no such provision for expenses.

10. I agreed to a schedule that put the Less case on for trial prior to the Raab case. In my view, this agreement was simply an accommodation to the lawyers who were involved in both cases. Obviously both cases could not be tried simultaneously. This scheduling arrangement as far as I was concerned had no implications involving the questions of fact or law to be tried in the Less case or the relationship, if any, of these questions to the Raab case.

Harold J Boreanaz

HAROLD J. BOREANAZ

Subscribed and sworn to before
me this 26TH day of January, 1976.

Edgar C. NeMoyer

EDGAR C. NeMOYER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 77

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB

Plaintiff

-vs-

AFFIDAVIT

TABER INSTRUMENT CORP., et al

Civ. No. 1967-190

Defendants

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

VICTOR T. FUZAK, being first duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and a member of the firm of Hodgson, Russ, Andrews, Woods & Goodyear.

2. I first became acquainted with the case entitled Less v. Taber Instrument Co., Civ. No. 1967-182, in May 1971 when my firm was retained to represent Teledyne, Inc. Teledyne's Managing Agent, Warren J. Hildebrandt, had been served with a subpoena duces tecum to Teledyne, Inc. as a non-party in the Less case at the offices of Taber Instrument Division of Teledyne, Inc., located in North Tonawanda, New York. The subpoena required the appearance of Teledyne Chief Executive Officer Dr. Henry E. Singleton and was purportedly served pursuant to Rule 45(d) of the Federal Rules of Civil Procedure.

APPENDIX D

3. On June 4, 1971, Hon. John T. Curtin issued an order to show cause why the subpoena should not be quashed. There was a hearing in this matter and on October 12, 1971 Judge Curtin ordered that the deposition be taken at Teledyne's principal place of business in California at a time and date to be arranged by the parties. That order made no provision for payment of expenses of counsel for deponents or defendants.

4. I am unaware of any provision in the Federal Rules of Civil Procedure or any "prevailing practice" as referred to in the Sweet Affidavit of December 15, 1975 at paragraph 12, that would have required the plaintiff in the Less case to pay the expenses to California, and return, with overnight accomodations for defense counsel, absent a court order.

5. At no time did counsel for any defendant indicate to me that the deposition of Teledyne sought in the Less case was also a deposition in the Raab case. On the contrary, the subpoena and all motion papers and orders relating to it bore only the title of the Less case.

6. So far as I am aware, counsel for plaintiff in the Less case never made any attempt, subsequent to this Court's Order of October 12, 1971, to take the deposition of any witness from Teledyne, Inc. in California. When I had heard nothing in this matter for six months, I considered the matter closed and terminated.

7. On May 13, 1974, I appeared in Less v. Taber Instrument Co., Civ. No. 1967-182, representing Warren J. Hildebrandt, a named defendant. A Notice of Retainer and Appearance was filed on that date. Mr. Hildebrandt had been an officer and director of Taber Instrument Co. and had remained with the company as a supervisory employee after it became the Taber Instrument Division of Teledyne, Inc.

8. Prior to this time Mr. Hildebrandt had been represented by Charles J. McDonough along with three other defendants in the Less case, Ralph Taber, Benjamin Manasen and the Taber Instrument Co. By letter dated May 1, 1974, the Court directed that substitute trial counsel be obtained by Mr. Hildebrandt because it appeared that Mr. McDonough would be an important trial witness.

9. Mr. Hildebrandt also retained me to represent him in the matter entitled Raab v. Taber Instrument Co., Civ. No. 1967-190. Mr. Hildebrandt had previously been represented by Mr. McDonough in this matter.

10. I have reviewed the files in both the Less and Raab matters, and, of course, have conferred with Mr. Hildebrandt and others concerning both cases. It is and has from the outset been my opinion, based on that review and the work I have done, that the two cases are quite different. I have never viewed them as "companion cases", whatever that term might mean. The facts in the two cases are quite

different. My client's position as to each matter was different. In my opinion, the legal questions are different in each case.

11. I appeared in the Less and Raab matters at a special pretrial conference before Hon. John T. Curtin on June 4, 1974. At that time a tentative trial date was set for October 15, 1974.

12. I have never asked for any continuance, postponement or adjournment in either the Less case or the Raab case.

13. In my opinion, my client's defenses in the Raab case have been adversely and irreparably prejudiced by the deaths of Messrs. Taber, McDonough and Ness which have occurred during the inordinate time plaintiff has permitted this case to languish and to become stale. Mr. Hildebrandt is sued only in his capacity as an officer and director of Taber Instrument Co. I have been advised by Mr. Hildebrandt as follows: He did not participate in any negotiations for the purchase of stock from Mr. Raab; he has no first-hand information with respect to transactions between Raab and the Taber Instrument Company; he has no first-hand information with respect to any negotiations or transactions between Teledyne, Inc. and the Taber Instrument Co. The testimony of Messrs. Taber and McDonough, who conducted these negotiations and transactions, was essential to Mr. Hildebrandt's defense in the Raab action and it is my assessment as his attorney that there is no substitute testimony or evidence available. I ask the Court to particularly bear in mind that because of Mr. McDonough's personal involvement, Mr. Hildebrandt did not have wholly independent representation until my

retention as counsel, and that my questioning and handling of witnesses such as Messrs. Taber, McDonough and Ness, who by reason of plaintiff's delays are no longer available, would, I am sure, have been quite different than what occurred on depositions in the Less case. The extraordinary lapse of time has thus deprived Mr. Hildebrandt of obtaining the first-hand protection he would have had through proper examination of these participants in the transactions at issue in the Raab case.

14. I agreed, solely as a matter of scheduling, to the proposal that the Less case be tried before the Raab case. Since four of the five law firms involved in the Less matter were also involved in the Raab matter, it was obvious that the two cases could not be scheduled for trial simultaneously. The agreement on trial schedule certainly reflected no recognition on my part of any relationship of fact or law between the two cases.

15. I have been practicing before the United States District Court for the Western District of New York for 25 years. I am not aware of any "common practice" in the period 1967 through 1971 of placing cases on the calendar by filing notes of issue and then carrying the cases over from term to term for a period of years for completion of discovery or any other purpose. On the contrary, it has been my general understanding that notes of issue should not be filed until the matter is ready for trial.

16. I have, from the outset, taken the position that Mr. Hildebrandt was subject to no liability in either the Less case or the Raab case, and that by reason of his financial circumstances he would not participate, even on a "nuisance value" basis, to the settlement of either lawsuit. I have consistently so advised all attorneys, including Mr. Sweet, as well as the Court. Accordingly, I did not delay making a settlement offer until January 23, 1975 as asserted in paragraph 16 of Mr. Sweet's Affidavit dated December 15, 1975, since I had no offer to make. Mr. Sweet has known my position since June 1974, and that position has not changed. It should be pointed out, however, that during the period from early November 1974 when the Less case was settled (without contribution by Mr. Hildebrandt) to January 23, 1975, Mr. Sweet never approached me to discuss possible settlement of the Raab case.

Victor T. Fuzak

Subscribed and sworn to before me
this 23rd day of January, 1976.

Susan K. Waters

SUSAN K. WATERS
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

In the
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff,

v.

Civ. No. 1967-190

TABER INSTRUMENT CORP., et al.,

Defendants.

STATE OF NEW YORK)
) ss:
COUNTY OF ERIE)

EDWARD D. SIEMER, being first duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and a member of the firm of Falk, Siemer, Glick, Tuppen & Maloney.

2. In January, 1974, I was requested by Marine Midland-Western, one of the executors of the Estate of Ralph F. Taber, to represent the Estate in the actions entitled Less v. Taber Instrument Corp., Civ. No. 1967-182, and Raab v. Taber Instrument Corp., Civ. No. 1967-190. I agreed to undertake that representation and counsel for all parties, including Mr. Sweet, were informed promptly. Counsel for plaintiffs in those actions made a single inquiry in this regard in January, 1974.

3. On March 8, 1974, notice was served on all parties in the actions entitled Less v. Taber Instrument Corp., Civ. No. 1967-182, and Raab v. Taber Instrument Corp., Civ. No. 1967-190 that our firm was substituted for Charles J. McDonough as counsel for defendant, the Estate of Ralph F. Taber.

4. On April 29, 1974, at a pretrial conference before Hon. John T. Curtin, the court directed that substitute trial counsel be obtained for Taber Instrument Corp. because its then counsel, Charles J. McDonough would be an important witness at trial.

5. On June 3, 1974, at a pretrial conference before Hon. John T. Curtin, it was suggested that the court appoint a receiver to act on behalf of Taber Instrument Corp. The Corporation was unable to act for itself as it had no shareholders and no directors. The matter was adjourned to June 24, 1974 to permit counsel to submit a plan for representation of the corporation.

6. On July 24, 1974, an order was entered appointing Edward J. Carland as receiver for the Taber Instrument Corp. Thereafter Mr. Carland retained our firm to represent the corporation.

7. Upon examination of the files and pleadings in the two cases, we determined that the Less and Raab actions rested on different factual grounds and different legal theories. There was pending a motion by counsel for plaintiffs to consoli-

date these cases. The cases were plainly inappropriate for consolidation, and we opposed that motion. The motion was subsequently withdrawn. In my opinion, the motion for consolidation was made as an attempt to get the depositions taken only in the Less case admitted into evidence with respect to the Raab case. That was necessary because Mr. Taber had died before being deposed as to the Raab case. We have never considered the Less and Raab cases to be related or "companion" cases, and have never communicated any position to the contrary to the court or counsel for plaintiffs.

8. We agreed to a schedule under which the Less case would be tried before the Raab case. That agreement was based only on considerations of convenience of counsel as several of the lawyers in the Less case, including ourselves, were also involved in the Raab case and it was obvious that the two cases could not be tried simultaneously. That agreement had no reference to substantive considerations as to questions of law or fact involved in the two cases.

9. After the Less case was scheduled for trial we concentrated on finishing the discovery in that case. Discovery in the Raab case was held in abeyance. We traveled to California and interviewed Teledyne officials, including Dr. Singleton, the Chairman of the Board, who had never been deposed by plaintiff in either case. That discovery led to

the settlement of the Less case at an amount only slightly above that proposed by defendants six months earlier.

10. After the Less case was settled, in November, 1974, I informed Mr. Sweet, counsel for plaintiff in the Raab case, that he should submit a settlement proposal in the Raab case based on the settlement formula in the Less case, taking into consideration the amounts already paid to Mr. Raab in settlement of the pension claims. Mr. Sweet agreed to do that, but did not come forward with any proposal. In December, 1974, Mr. Sweet inquired whether the defendants would make any offer. I told him once again that the defendants would consider any proposal for settlement that he cared to make based on the settlement formula in the Less case. Finally, in January, 1975, Mr. Sweet proposed a settlement of approximately $25,000. I told him that based on the settlement formula in the Less case, that figure was far out of line because Mr. Raab's stock was worth only $30,000 and Mr. Raab had already been paid some $27,000 by the Taber Instrument Corporation. Mr. Sweet said that the plaintiff would not agree to take into consideration any amount already paid by the corporation and that his offer of $25,000 was generous as the case was worth about $32,000. After January, 1975, Mr. Sweet made no further efforts to settle the case beyond appearances at pre-trial conferences scheduled by the court.

11. Because the Less and Raab cases arise out of

different transactions and thus out of different facts, the discovery in the Less case did not cover the facts in the Raab case. At the March 19, 1975 pre-trial conference, we renewed our request for additional discovery on the Raab case. That request had been made previously at the pre-trial conference on June 3, 1974 and at the hearing on November 5, 1974. In preparing for this discovery, we found that the deaths of Messrs. Taber and McDonough had so handicapped the preparation of any defense in the Raab matter that we were obliged to move to dismiss, which we did promptly.

Edward D. Siemer
Edward D. Siemer

Subscribed and sworn to before
me this 22nd day of January, 1976.

Viola K. Barrett
VIOLA K. BARRETT
NOTARY [illegible] YORK
My [illegible] 1976

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

In the
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB
Plaintiff
v.
TABER INSTRUMENT CORP., et al.
Defendants

Civ. No. 1967-190

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

ROSS L. RUNFOLA, being first duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and a member of the firm of Brennan, Tesseyman, Zelman, Runfola & Brownstein.

2. On May 20, 1974, my firm filed a Notice of Retainer and Appearance for Benjamin Manasen in the matters entitled Less v. Taber Instrument Corp., Civ. No. 1967-182 and Raab v. Taber Instrument Corp., Civ. No. 1967-190. My associate, Arnold Zelman, and I have worked on these cases.

3. Mr. Manasen had been a director of the Taber Instrument Corp. and was sued in that capacity in both actions. The Taber Instrument Corp. was also a defendant in both actions.

4. Prior to May 20, 1974, Mr. Manasen was represented by Charles J. McDonough who also represented the Taber Instrument Corporation and its other officers and directors.

Defendants' Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Set Aside Judgment of Dismissal.

5. We have never regarded the Less and Raab cases as related or "companion" cases; nor have we ever indicated to the court or counsel for plaintiffs that we regarded the questions of fact and law in the two cases to be the same. When counsel for plaintiffs in the two cases moved to consolidate the cases we opposed that motion on the ground that there were no common issues of law or fact.

6. We first appeared in the Less and Raab actions at the pre-trial conference before Hon. John T. Curtin on June 3, 1974. At that time a trial date was set for the Less action. Since that time we have not requested any continuance, adjournment or other delay in either case.

7. We agreed that the Less case be tried before the Raab case. That agreement reflected an accommodation to the lawyers who were involved in both cases. It had no implication of any relationship between the cases.

8. During the period from November, 1974 to February, 1975, I was not approached by counsel for plaintiff in the Raab case in any effort to settle that case or to move it on to trial.

ROSS L. RUNFOLA

Subscribed and sworn to before me
this 23rd day of January, 1976.

Jean R Agostinelli

JEAN R. AGOSTINELLI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 77

Affidavit of Robert M. Hitchcock.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff,

vs.

Civil 1967-190

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

ROBERT M. HITCHCOCK, being duly sworn, deposes and says:

For many years prior to May 8, 1967, the date this action was instituted, I was a member of the firm of Phillips, Lytle, Hitchcock, Blaine & Huber and its predecessor firms, and in charge of its Litigation Department. I continued as a member of said firm through June 30, 1974, and was employed by it thereafter through December 31, 1974, when I retired. I am now listed on the firm letterhead as "of counsel". I have had complete and active charge of this case since its inception.

I make this affidavit in opposition to plaintiff's motion to vacate the judgment herein entered November 25, 1975.

The motion is supported by the affidavit of David L. Sweet, Esq., although there are also affidavits of Messrs. Heffernan and Montgomery which, I submit, add nothing to the Sweet affidavit.

Apart from nit-picking at the November 25, 1975 decision of Hon. John T. Curtin, and re-asserting earlier denials, the Sweet affidavit sets forth what I can but refer to as "the Sweet facts", all of which he knew when his affidavits were submitted in opposition to the motion to dismiss for delay (now nearly nine years) in plaintiff's prosecution of this action.

The Sweet affidavit further demonstrates that Mr. Sweet is incurably allergic to actual facts. The clearest example occurs at pps. 2, 3, 5, 6, 9, 13 and 16 (on some pages more than once) where he refers to Less and Raab as "companion cases." I do not know what he means by that term. All that is companionable about the two cases is that they were instituted on the same date by the same counsel, and that some of the defendants in Less are also defendants in Raab. I have never treated them in any way as involving anything else; having throughout rejected any suggestion that the issues of fact or law were the same in both.

Mr. Sweet never suggested to me during the period 1967 through 1973 that he intended to move to consolidate these cases. If such a suggestion had been made at any hearing or pre-trial conference, I would have objected, because, as appears below, both the factual and legal issues were markedly different.

Affidavit of Robert M. Hitchcock.

I have throughout firmly refused to contribute anything to any *Raab* settlement. I have never confirmed any expectation on the part of anyone that if the *Less* case were settled, the *Raab* case could be disposed of along similar lines, as regards any participations by *Dr. D'Angelo*. The only reason I contributed to the Less settlement was that Dr. D'Angelo was a party, along with T.I.C.-Taber and Himmelfarb in pledging $300,000 ($100,000.00 each) of Teledyne stock when Teledyne acquired T.I.C. assets in December 1966. The pledge provided, *inter alia*, that if any of the said parties was held liable in the *Less* action each would contribute *pro rata* up to the value of that stock. I have always believed that Dr. D'Angelo had a good defense in that action because he had nothing to do with the negotiations resulting in the sale of T.I.C. assets (he had tried and failed to purchase the Less stock for himself), and, as Taber testified, subsequent to April 30, 1965, (no negotiations between T.I.C. and Teledyne were had until after February 3, 1966) Mr. McDonough alone handled all negotiations relating to the sale of the Less stock (Taber deposition August 3, 1967, pp. 187-190); and because, as Dr. D'Angelo testified, he fully advised *Less* in the spring of 1966 that there were negotiations taking place between T.I.C. and Teledyne, and that *Less* scoffed that there was any likelihood at all that *Taber* would ever sell his company (D'Angelo deposition November 9, 1967, pp. 416, 417, 456-459, 482). However, my analysis of the law, as it has been developing over the nine years that this case has been pending, and the facts indicated a substantial possibility that the Estate of Ralph Taber or Taber Instrument Corporation would be held liable, in which event Dr. D'Angelo would lose his $100,000 stock pledge even though he won the litigation. Further, he would have incurred substantial legal fees in the process, which he could not afford. I, therefore, advised Dr. D'Angelo to contribute the proceeds, viz., the then value of his pledge shares (approximately $53,000.00), less his attorneys' fees of approximately $23,000.00 to the $460,000.00 Less settlement. This was done, his contribution amounting to approximately $30,000.00

The aforesaid indemnity agreement was given to cover any liability arising from the sale of Less stock - not a word therein regarding the sale of Raab stock - and the indemnity agreement was signed six months after Raab sold his stock.

The actual facts, well known to Mr. Sweet, are that Dr. D'Angelo had nothing whatsoever to do with any negotaitions resulting in the sale of Raab's stock to T.I.C. Raab testified that his attorney, Mr. Ness, negotiated in his behalf for the sale (Raab deposition, October 1, 1970, p. 56); that the only relationship he had with Dr. D'Angelo with respect thereto was "early in 1965" when Dr. D'Angelo "indicated that he thought he could get what I paid for my stock" (Id. pp. 59, 60). Mr. Sweet prevented development of Raab's knowledge of the negotiations with Mr. Ness (now deceased) advising him not to testify as to any conversations with Mr. Ness in that they "are confidential communications between lawyer and client, which is privileged." (Id. pp. 50, 51). Mr. McDonough testified, and produced his memoranda in confirmation, that it was he who negotiated with Mr. Ness (McDonough deposition, July 13, 1970, pp. 7-12). Both of these depositions (Raab and McDonough) were captioned in the Raab action alone.

Dr. D'Angelo's talk "early in 1965" was at least eight months before there was any thought of negotiating with Teledyne, and Mr. Sweet well knows such to be the fact. The record is replete to the effect that the first mention of possible acquisition of T.I.C. by Teledyne was February 3, 1966. At page 11 of his affidavit Mr. Sweet lapses into accuracy when he states "... plaintiffs (in October 1970) were in a position to establish that negotiations between Teledyne and Taber Instrument had been initiated in February 1966 ..." (Emphasis mine).

It is conclusive, therefore, that when Dr. D'Angelo talked with Raab in the spring of 1965 there were no negotiations to disclose, and no one knows it better than Mr. Sweet.

On various occasions, I, and on one occasion Mr. Cordes of my office, asked Mr. Sweet to dismiss the Raab action vs. Dr. D'Angelo, citing the above facts plus Dr. D'Angelo's financial plight. Mr. Sweet, not deigning to discuss the facts, refused. I had Mr. Cordes submit a single interrogatory to Mr. Sweet asking that plaintiff state every fact which he intended to present at the trial to establish liability on the part of Dr. D'Angelo. At the pre-trial conference on July 17, 1975, I again requested

Mr. Sweet to answer that interrogatory and pointed out that the answer was overdue. To date, Mr. Sweet has not given that interrogatory so much as the cold respect of a passing glance.

In the *Raab* action, neither Mr. Sweet nor anyone else has ever sought Dr. D'Angelo's testimony.

There is not a word of testimony that Dr. D'Angelo up to the time this action was instituted had had any knowledge that *Raab* had sold his 600 shares to T.I.C.

There is no wonder, therefore, that I never considered the two cases as companionable by any sense of the term.

Moreover, Mr. Sweet recognized that the issues in the two actions were different. He made a motion for a consolidated trial *and then withdrew it* when the opposition thereto established beyond doubt that the issues were so disparate that such a trial would encompass such confusion as to amount to chaos. He withdrew his motion by letter to the Court, dated March 20, 1974.

Throughout his affidavit Mr. Sweet states, suggests and implies that the delays in this nine year-old case were not occasioned by his firm. (Id. pp. 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16).

There was a pre-trial on April 2, 1971. Again Mr. Sweet lapses into a semblance of accuracy. He swears that on that date:

> "We advised the Court that we planned to take the deposition of Teledyne or certain officials of Teledyne Inc., a California corporation, and of defendant Himmelfarb, and the defendants indicated that they wanted to take the depositions of David Sweet and Eugene Murphy." (p. 7).

Affidavit of Robert M. Hitchcock.

On that occasion Mr. Sweet made it clear that those "planned depositions" would take place in California and Mexico. I said that I intended to take the depositions of Messrs. Sweet and Murphy and would do so immediately upon plaintiffs' attorneys advising that their discovery was completed. The Court agreed that such arrangement was proper.

What nonsense it is for Mr. Sweet to swear (p. 10.):

> "There were two valid reasons why the taking of those depositions (Teledyne witnesses and Himmelfarb) was deferred until the completion of plaintiffs' other discovery: 1. It was hoped that the evidence discovered from the depositions of the witnesses available locally would be sufficient to establish the plaintiffs' causes of action in both Less and Raab without the necessity of taking the depositions of the Teledyne witnesses, who resided in California, and of Mr. Himmelfarb, who resided in Mexico."

Plaintiff never thereafter conducted any "other discovery", took no further depositions from local witnesses or anyone else, and there is nothing in the record to show that Teledyne witnesses or Himmelfarb had ever heard of Raab prior to April 2, 1971.

Mr. Sweet's office and mine were in the same building. I saw him on various occasions subsequent to April 2, 1971, and asked when he was going to complete his discovery - that the cases were growing beards -. No definite answer was made. Finally on, or the day before September 19, 1972, Mr. Sweet told me that his discovery was complete, that he was not going to take any Teledyne or Himmelfarb depositions. Pursuant to my said assurance to the Court nearly 18 months earlier, on September 19, 1972, I noticed the depositions of Messrs. Sweet and Murphy for October 14, 1972, a date that Mr. Sweet and I had agreed upon.

Bearing date October 13, 1972, Mr. Heffernan wrote to all counsel and to Magistrate Maxwell that the said depositions "have had to be adjourned because Mr. Murphy was called out of town unexpectedly and are now scheduled for . . . October 21 . . ."

Mr. Murphy's deposition was taken on Saturday, October 21, 1972, and Mr. Sweet's on October 28, 1972.

DURING THE PRECEDING SOME 19 MONTHS NOT A SINGLE DEPOSISITION WAS TAKEN, AND THAT DELAY IS ATTRIBUTABLE SOLELY TO PLAINTIFF.

At all times after October 28, 1972 I was ready for trial. In fact I could have been ready for trial within days after plaintiff completed his discovery, which was prior to April 2, 1971.

Again, with regard to Mr. Sweet's intimations that any delay was due to defendants, the fact is that from 1970 on, at virtually every meeting of counsel and the Court, both in open court and in chambers, I repeated time and again, in substance, that these cases should have been tried years ago. On May 15, 1974, having previously advised the Court and counsel that our partnership agreement required my retirement on June 30, 1974, I wrote to the Court with copies to all counsel. Referring to the sudden death of Mr. Runyan, one of our partners, and the problems of distributing his work load, I wrote that I was staying on until December 31, 1974. My letter concluded:

> "I can try it (Less) anytime during June or July or between September 15 and December 31. In the hope and expectation that at the conference on June 3 a trial can be set to begin within those dates, we are not reassigning the case to other trial counsel."

Thus, in the light of all the foregoing Mr. Sweet cannot accurately contend that the defendants (plural) who include Dr. D'Angelo, were responsible for plaintiff's inordinate and inexcusable delay in prosecuting this case.

Time and again in his affidavit Mr. Sweet refers to actions of defendants (plural), whereas the fact is that all the defendants who, of course, include, Dr. D'Angelo, did not participate. (Sweet affidavit, pp. 2, 3, 7, 8, 10, 11, 12, 13, 14, 15, on some pages more than once.)

My case was weakened materially by the death of Mr. McDonough. He was by far, the most significant actor in both cases. During his deposition, time after time he refused to answer questions or disclose relevant papers claiming attorney-client privilege. He was my age and it never occurred to me that he would not be available at the trial. As a matter of strategy I then made no issue of his privilege claims. This was deliberate on my part. I wanted him on the stand for the jury to observe his refusals, if repeated, and for the Court to rule thereon. In my opinion his privilege claim was baseless. Moreover he represented T.I.C. and all its directors and could easily have ascertained their position as to waiving the privilege, as Dr. D'Angelo waived it when Attorney Bartlo testified. I wanted to question Mr. McDonough as to any efforts he made to place the matter of waiver before his clients and what advice he gave them with respect thereto. I intended to develop these facts fully at the trial. Mr. Sweet asserts that there were "numerous inquiries" by counsel for plaintiff to counsel for defendants during the period from March 13, 1973 to January 18, 1974 about substitution of counsel for the Taber estate. I have no recollection or record of "numerous inquiries" to me during that period. Further, I know of no affirmative action taken by plaintiff's counsel during that period to expedite a trial.

In summary: Mr. Sweet presents no "facts", by his understanding of the term, on this motion that were not available to him and should have been presented in opposing the motion to dismiss. His sole present claim is that the Court erred in its decision. What he is now doing is attempting to utilize this motion to submit new "facts" as a substitute for appeal. I respectfully submit that he should not be permitted to do so.

I apologize for the length of this affidavit. I am unable to shorten it and still present the actual facts, and cite the record in support of them, in opposition to "the Sweet facts".

WHEREFORE, I respectfully pray that this motion be denied.

Robert M. Hitchcock
Robert M. Hitchcock

Sworn to before me this
22nd day of January, 1976
Gloria A. Sartori
Notary Public

GLORIA A. SARTORI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

AAz

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION,
et al,

Defendants

CIVIL NO. 1967-190

SUPPLEMENTAL AFFIDAVIT

STATE OF NEW YORK :
COUNTY OF ERIE : SS:

DAVID L. SWEET, being duly sworn deposes and says:

1. This affidavit is submitted in response to the affidavits of Robert M. Hitchcock dated January 22, 1976, Harold J. Boreanaz dated January 26, 1976, Victor T. Fuzak dated January 23, 1976, and Edward D. Siemer dated January 23, 1976, and Ross L. Runfola dated January 23, 1976.

2. For the most part the allegations of said affidavits are already controverted by the affidavits and exhibits submitted by plaintiff in support of this motion and in opposition to defendants' original motion to dismiss. However there are some allegations in the latest defendants' affidavits

which are too outrageous to leave unanswered.

THE HITCHCOCK AFFIDAVIT

The statement appears at page 2 that Mr. Hitchcock "would have objected" to any suggestion on the part of the plaintiff to consolidate the Raab and Less cases. In fact however, after that suggestion had been made by plaintiff Mr. Hitchcock stated that he had no objection and would not oppose it. I reported this to Mr. Siemer on January 18, 1974, and asked him whether he , as new trial counsel, would also be agreeable, and Mr. Siemer said he would let me know.

The statement is made at page 4 of Mr. Hitchcock's affidavit, with regard to the indemnity agreement given to cover liability arising from the purchase of the Less stock, that there was "not a word therein regarding the sale of Raab stock." However, the original draft of the indemnity agreement expressly referred to indemnity against possible liability arising from the purchase of the Raab stock as well as the Less stock. Attached as Exhibit "A" hereto is a draft of a "PLEDGE AGREEMENT", (marked on discovery as Plaintiff's Exhibit No. 152) which provides for a pledge of Teledyne shares worth $550,000.00 by

D'Angelo and others as security for an indemnity against any liabilities "which may arise with respect to the purchase of 14,100 shares of TABER INSTRUMENT capital stock from Joseph F. Less and 600 shares from Junia E. Raab as well as with respect to the sale and issuance of 14,100 shares of TABER INSTRUMENT capital stock to Manasen and D'Angelo". There was testimony by Mr. McDonough and defendant D'Angelo that said PLEDGE AGREEMENT was submitted to D'Angelo and the others at the insistance of Teledyne (see, for example Exhibit "B" attached hereto, letter to D'Angelo from McDonough, marked on discovery as plaintiff's Exhibit No. 155) and that it was only after bitter and extended negotiation that the indemnity agreement was finally revised, to reduce the amount thereof to $300,000.00 from $550,000.00 and to omit reference to the purchase of the 600 shares of Raab stock.

The foregoing refutes, of record, the surprising statement at page 6 of the Hitchcock affidavit that "there is not a word of testimony that Dr. D'Angelo up to the time this action was instituted had had any knowledge that Raab had sold his 600 shares to TIC". It also demonstrates the total inaccuracy of the statement at page 7 that "there is nothing in the record to show that Teledyne witnesses or Himmelfarb had ever heard of Raab prior to April 2, 1971".

With regard to Mr. Hitchcock's statement concerning discovery following the April 2, 1971, pretrial meeting, Mr. Hitchcock was served with copies of all notices of the proceedings with respect to our efforts to obtain the depositions of the Teledyne witnesses in Buffalo, and to secure the appearance of defendant Himmelfarb, and Mr. Hitchcock and counsel for the other defendants were aware of the difficulties and delays encountered. The depositions of myself and Mr. Murphy could have been taken whenever the defendants saw fit to do so, as they were wholly unrelated to the depositions sought by us of the Teledyne witnesses and Himmelfarb. On no occasion, including any encounters in our office building, did I ever express any opposition to Mr. Hitchcock's going ahead with the taking of our depositions, or of any other discovery he may have deemed advisable.

Following service in late September, 1972, of separate notices by Mr. Hitchcock and Mr. McDonough to take the Murphy and Sweet depositions in October, 1972, our office cooperated fully, and to accommodate counsel for the defendants, we made ourselves available on successive Saturdays for the taking of those depositions.

Regarding the sweeping and obviously improper "single interrogatory" submitted to me by Mr. Hitchcock's firm, referred to at p. 5 of his affidavit, I point out that said interrogatory was served May 22, 1975, and that Mr. Hitchcock's firm had represented defendant D'Angelo in both the Less and Raab cases since their inception.

Mr. Hitchcock's conclusory assertion that he is prejudiced by the loss of Mr. McDonough is without merit and denied. In addition, it is noteworthy that Mr. Hitchock admits that he deliberately, as a matter of strategy did not examine Mr. McDonough as fully as he could have during the course of Mr. McDonough's several depositions taken in the Less and Raab actions.

In partial substantiation of the numerous inquiries I made during the period from March 13, 1973 to January 1974, I have attached hereto as Exhibit "C" a memorandum I made at the time for our files in Raab and Less of conversations with Mr. Bain of the Hitchcock firm on July 5, 1973, and Mr. Hitchcock on June 19, 1973.

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

THE SIEMER AFFIDAVIT

This affidavit contains many misrepresentations of fact and unfounded arguments which are refuted by previous affidavits and exhibits submitted on behalf of plaintiff, and the record.

Paragraphs 9 and 10 deserve special attention, however, as they are truly flagrant illustrations of a willingness to disregard, or distort, the true facts and circumstances of this litigation in order to obtain unfair advantage.

Paragraph 9 of the Siemer affidavit, after referring to discovery taken by the defendants after the Less case was scheduled for trial (in October 1974) states as follows :

> "That discovery led to the settlement of the Less case at an amount only slightly above that proposed by defendants six months earlier."

Annexed hereto as Exhibit "D" is a letter to the court dated October 2, 1974, from Mr. Siemer himself, and other defendants' counsel, which states in part as follows :

> "The only offer of settlement made to Mr. Sweet was in the sum of $400,000. before your honor in the status report of September 24, 1974. No offer of $500,000. was made "more than two months ago" nor referred to before your honor. No offer of $492,500. was made October 1st at a meeting of counsel."

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

Paragraph 10 of the Siemer affidavit also grossly misrepresents the facts concerning settlement negotiations conducted in the Raab case following settlement of the Less case. The Less case was settled in November, 1974, for $560,000., which was roughly equivalent to the difference between the $141,000. he had received for his 14,100 shares at $10.00 per share, and the amount of $705,000. computed at the Teledyne acquisition price of about $50.00 per share. In discussing the mechanics of concluding the Less settlement, I asked Mr. Siemer about settling Raab along the same lines. He said he would take it up with counsel for the other defendants and let me know. Later, at his request and after some discussion I indicated we would recommend settlement for about $25,000., which was roughly equivalent to the difference between the $4,800.00 received by Raab for his 600 shares at $8.00 per share, and the amount of $30,000. computed at the Teledyne price of $50.00 per share. Mr. Siemer said he would discuss this proposal with the other defendants. Finally, on January 23, 1975, Mr. Siemer told me that in computing a settlement figure, credit would have to be given in full for the amount of $23,554.49 paid to Raab as profit sharing benefits by the Taber Instrument Profit Sharing Trust (not by Taber Instrument Corporation) which had been the subject of a previous state court suit. Mr. Siemer went on to say that on that basis Raab was only entitled to about $2,700.00. He then proposed settlement for $5,000.00, which he said he had not yet taken up with counsel for the other defendants. I immediately rejected the offer, as out of the question, and the next day informed Deputy Court Clerk Walsh that settlement negotiations had been unavailing, and asked that the marking of exhibits for trial be scheduled.

In the concluding sentence of paragraph 10, Mr. Siemer's affidavit makes the amazing statement that after January 1975, I made no further efforts to settle other than to attend pre-trial conferences scheduled by the Court. In truth, as Mr. Siemer well knows, we have made many efforts since that date to arrive at a fair settlement with Mr. Siemer's daughter, Deanne Siemer, and the other defendants' counsel. Attached, for example, are Exhibit "E" being my file memorandum dated July 15, 1975, as to phone conversations of that date with counsel for all defendants, Exhibits "F" and "G", being my letters dated July 25, 1975 and July 28, 1975, to Miss Siemer and other opposing counsel.

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

THE BOREANAZ, FUZAK AND RUNFOLA AFFIDAVITS

The affidavit of Mr. Boreanaz adds little not previously alleged by the defendants and already controverted. However, with regard to our motion in October 1971 to strike Mr. Himmelfarb's answer, it was several weeks after the court had already given a verbal ruling denying our motion, that at the suggestion of one of the court's law clerks I agreed to have the motion marked as "withdrawn", to eliminate the necessity for a written order.

The affidavits of Mr. Fuzak and Mr. Runfola consist essentially of second hand allegations and arguments, which require no further response. Neither denies that their clients were both directors of Taber Instrument throughout the transactions involving the Teledyne acquisition and the purchases of the Less and Raab shares, all of which requiredand received their express approval.

David L. Sweet

Subscribed and sworn to before
me this 9th day of February, 1976.

Florian Carl Flierl

NOTARY PUBLIC, ERIE COUNTY, N.Y.
FLORIAN CARL FLIERL
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

PLEDGE AGREEMENT

THIS PLEDGE AGREEMENT is made this __________ day of ________________, 1966, by and among TABER INSTRUMENT CORPORATION, a New York corporation having its principal place of business at 111 Goundry Street, North Tonawanda, New York ("TABER INSTRUMENT"), TELEDYNE, INC., a Delaware corporation having its principal place of business at 12525 Daphne Avenue, Hawthorne, California ("TELEDYNE"), RALPH F. TABER ("TABER"), an officer, director and principal stockholder of TABER INSTRUMENT, BENJAMIN E. MANASEN ("MANASEN"), an officer and director of TABER INSTRUMENT, and DR. JOSEPH D'ANGELO ("D'ANGELO"), a principal stockholder of TABER INSTRUMENT.

This Pledge Agreement is based upon the following facts:

(i) TABER INSTRUMENT and TELEDYNE have entered into a Plan of Reorganization and Agreement (the "Agreement") dated ______________, 1966, providing for the transfer by TABER INSTRUMENT of substantially all of its assets, subject to certain liabilities, to TELEDYNE (or to a controlled subsidiary of TELEDYNE) in exchange for shares of TELEDYNE's One Dollar ($1.00) par value, fully paid and nonassessable Common Stock having an aggregate value of $49.36 multiplied by the number of shares of TABER INSTRUMENT's capital stock which shall be outstanding on the date the Agreement is consummated (hereinafter referred to as the "Closing Date").

(ii) MANASEN and D'ANGELO have purchased from TABER INSTRUMENT an aggregate of 14,100 shares of TABER INSTRUMENT's capital stock theretofore held in its treasury, which shares had previously been redeemed from Joseph F. Less.

(iii) It is anticipated that immediately after the Closing Date, TABER INSTRUMENT shall liquidate and distribute shares of TELEDYNE Common Stock to its stockholders (including MANASEN and D'ANGELO) in cancellation and retirement of their TABER INSTRUMENT capital stock.

(iv) Paragraph 7.18 of the Agreement provides that TABER INSTRUMENT shall pledge shares of TELEDYNE Common Stock having an aggregate value of $550,000.00 (which value shall be computed in accordance with the provisions of Paragraph 32 of the Agreement) in order to indemnify TELEDYNE (and secondarily TABER) against any liabilities, costs or expenses in connection with certain stock redeemed from certain of the former stockholders of TABER INSTRUMENT.

IT IS THEREFORE AGREED as follows:

1. Pursuant to the Agreement, TELEDYNE shall deliver on the Closing Date certificates registered in the name of TABER INSTRUMENT covering an aggregate value of TELEDYNE Common Stock determined in accordance with Paragraph 3 of the Agreement. On the Closing Date TABER INSTRUMENT shall immediately redeliver to TELEDYNE one or more certificates covering that number of shares of TELEDYNE Common Stock having an aggregate value of $550,000.00 (which value shall be computed in accordance with the provisions of Paragraph 3.2 of the Agreement), together with "Assignments Separate from Certificate", which shall be held by TELEDYNE as pledge holder, subject to the terms and conditions hereinbelow contained.

2. TELEDYNE shall hold said shares as pledge holder for the period of the pledge (as defined below) but all of said shares shall be registered on the books of TELEDYNE in the name of TABER INSTRUMENT. At such time as TABER INSTRUMENT shall distribute shares of TELEDYNE Common Stock in liquidation to its shareholders in cancellation and retirement of their TABER INSTRUMENT capital stock, the shares subject to this Pledge Agreement shall be distributed in liquidation to MANASEN and D'ANGELO and shall thereafter be registered in their names in accordance with their interests therein. From and after the Closing Date, TABER INSTRUMENT (or MANASEN and D'ANGELO, as the case may be) shall be entitled to all cash

dividends and to the exercise of all voting rights with respect to their said shares so long as they are not in default under this Pledge Agreement. All shares of TELEDYNE stock subsequently issued to TABER INSTRUMENT (or to MANASEN or D'ANGELO, as the case may be) during the period of the pledge which are issued as a stock dividend, stock split, recapitalization, reclassification or other like issuances and which are referable to the shares held pursuant to the Pledge Agreement shall be delivered to and retained by TELEDYNE together with the shares subject to the pledge, as further security hereunder, and TABER INSTRUMENT, MANASEN and D'ANGELO hereby agree to execute all further "Assignments Separate from Certificate" in connection therewith as shall be necessary or appropriate.

3. The pledge of shares shall be for a period of two (2) years commencing on the Closing Date, provided, however, that if prior to the end of said two (2) year period, TELEDYNE shall notify the registered holder of said shares that it has any claim or claims against said shares pursuant to this Pledge Agreement, the period of the pledge shall be extended with respect to the party so notified and shall continue until such time as there shall be a final determination of the liability of said party with respect to any and all such claim or claims, and until such liability, if any, has been duly paid and/or otherwise satisfied.

4. TABER INSTRUMENT, MANASEN and D'ANGELO hereby agree to indemnify and hold harmless TELEDYNE and all of its subsidiary and affiliated corporations (and secondarily TABER, as provided below) against any losses, liabilities, expenses and costs (including reasonable attorney's fees) which may arise with respect to the purchase of 14,100 shares of TABER INSTRUMENT capital stock from Joseph F. Less and 600 shares from Jumia E. Raab as well as with respect to

the sale and issuance of 14,100 shares of TABER INSTRUMENT capital stock to MANASEN and D'ANGELO. This indemnification is made in addition to and not in contravention of any indemnities contained in the Agreement, and no inference is to be drawn herefrom as to the existence or non-existence of any liabilities pursuant to any representations and warranties contained in the Agreement. The purpose of this Pledge Agreement is to assure TELEDYNE (and secondarily TABER) with respect to the indemnity contained herein.

5. The pledge of shares provided for hereunder shall be held by TELEDYNE as pledge holder as security with respect to that certain Indemnity Agreement entered into by and among TABER, MANASEN and D'ANGELO, a copy of which is annexed hereto as Exhibit "A", provided, however, that the rights of TABER with respect to the pledged shares shall be in all respects subordinate to the rights of TELEDYNE hereunder to the effect that TABER shall not be entitled to make or effect any claims against said pledged shares unless and until all claims of TELEDYNE have theretofore been fully satisfied.

6. In the event that there shall be a final determination that TABER INSTRUMENT, MANASEN and/or D'ANGELO is liable to TELEDYNE in any amount pursuant to the terms of this Pledge Agreement and if such liability shall not have been fully paid and satisfied within a period of thirty (30) days after such determination, at any time within fifteen (15) days from the expiration of said thirty (30) day period, TELEDYNE may apply a sufficient number of pledged shares to satisfy the amount of said liability. After all liabilities to TELEDYNE hereunder have been fully satisfied, and to the extent that D'ANGELO and/or MANASEN shall be obligated to TABER pursuant to the terms hereof (or of the Indemnity Agreement contained in Exhibit "A"), TABER shall be entitled to have delivered to him a sufficient number of the pledged shares to pay the

amount of said liability. For the purposes of this Paragraph 6, the number of pledged shares which shall be applied to satisfy any such liability shall be determined by valuing said pledged shares at an amount equal to the closing sales price (or the mean between the bid and asked price if no sale shall have taken place on the date in question) on the New York Stock Exchange for the date immediately preceding the date upon which such shares shall be so applied or delivered.

7. In the event that the shares retained by TELEDYNE pursuant to Paragraph 6 above shall have an aggregate value (as determined pursuant to Paragraph 6 above) less than the amount of TABER INSTRUMENT's, D'ANGELO's and/or MANASEN's liability, TELEDYNE and TABER shall be entitled to proceed against all or any of them for the deficiency.

8. Notwithstanding anything to the contrary herein contained, neither TELEDYNE nor TABER shall be limited to the pledged shares to satisfy its or his claim or claims against TABER INSTRUMENT, MANASEN and D'ANGELO. Further, TELEDYNE and/or TABER shall be entitled, at its or his sole option, to proceed directly against TABER INSTRUMENT, or against any one or more of the stockholders of TABER INSTRUMENT (to the extent it or he is entitled to proceed against them under the Agreement and relevant laws), without resort to the security of the pledged shares.

9. Upon termination of the pledge period under all of the above provisions, the pledged stock (or the remainder thereof, as the case may be), shall be released by TELEDYNE to TABER INSTRUMENT, MANASEN and/or D'ANGELO.

10. TABER INSTRUMENT, MANASEN and D'ANGELO hereby waive all of the provisions of Sections 3001, 3002 and 3005 of the California Civil Code.

11. TABER INSTRUMENT, TABER, MANASEN and D'ANGELO hereby agree that TELEDYNE, as pledge holder, shall have the right

and authority to appoint Liberty National Bank and Trust Co. of Buffalo, New York (or other Bank or Trust Company in Buffalo, New York reasonably acceptable to TABER) as pledge holder in lieu of TELEDYNE at any time as TELEDYNE shall so desire and all parties hereto agree to execute any necessary or appropriate escrow instructions required by any such bank (to the extent not contrary to the provisions hereof) in order to effectuate the foregoing.

12. It is understood and agreed that MANASEN may, at his option, have the shares of TABER INSTRUMENT and/or TELEDYNE which he owns or shall own registered in the name of one or more nominees. In that event, MANASEN agrees to cause all such nominees to execute this Pledge Agreement as nominees so as to assure that the shares covered by this Pledge Agreement shall remain subject thereto and so as to effectuate all of the provisions hereof. MANASEN shall inform TABER INSTRUMENT and TELEDYNE by no later than the Closing Date of the name or names of all such nominees and the Pledge Agreement executed by MANASEN shall also, on or before the Closing Date, have been executed by all such nominees.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

TABER INSTRUMENT CORPORATION

By________________________
President

TELEDYNE, INC.

By________________________

____
RALPH F. TABER

____
BENJAMIN E. MANASEN

____
DR. JOSEPH D'ANGELO

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

August 9, 1966

Dr. Joseph P. D'Angelo
810 Abbott Road
Buffalo, N.Y.

Re: Teledyne-Taber Agreement

Dear Doctor:

As per your request, I enclose draft copies of a) Pledge Agreement and b) separate Indemnity Agreement, both of which must be executed by the various parties thereto, before closing of the Teledyne-Taber reorganization and sale.

As I advised you at the Stockholders' Meeting yesterday, I will be away on vacation from August 12 to August 29. I will be glad to discuss the enclosed with you or your attorney at any time before August 12 or after August 29.

Very truly yours,

McDONOUGH BOASBERG McDONOUGH & BELTZ

by

CJM L
Enc

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

MEMORANDUM

TO : Files

FROM : D. L. S.

DATE : July 5, 1973

RE : Joseph F. Less vs. Taber Instrument Corporation, et al - Junia E. Raab vs. Taber Instrument Corporation, et al

- -

I talked to Bill Bain today and he said that letters were granted on July 3, 1973, to Cindy R. Taber and Marine Midland Bank - Western as Executors.

The Trust Officer from the bank handling it is L. D. Sheldon (843-4785).

Bain and I discussed the substitution of the Executors for Mr. Taber and he said he felt that it ought to be handled by stipulation. I asked him whether I should talk to Hitchcock about that and he agreed that I should.

Bain said that there is going to be a meeting on July 10, 1973, to discuss the matter of new attorneys for the Estate. Apparently, the Falk, Siemer firm is going to take over, at least the administration of the Estate, and possibly the handling of the trial as well if it turns out that McDonough has to be replaced.

On June 19, 1973, Hitchcock told me it was a 4 million dollar estate.

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

Falk, Siemer, Glick, Tuppen & Maloney
Attorneys at Law
2200 Erie County Savings Bank Building
Buffalo, New York 14202
Area Code 716 852-6670

Stanley G. Falk
Edward D. Siemer
Charles D. Tuppen, Jr.
Alvin M. Glick
Edward J. Carland
Kevin P. Maloney
Richard C. Marcus
John R. Hamlett
Alfred S. Remsen, Jr.
Sheldon B. Benatovich
Edwin H. Wolf
Michael G. Kelly
Deanne C. Siemer

Eugene L. Falk, 1867-1929
Bradley H. Phillips, 1870-1938
Frederic R. Twelvetrees, 1892-1957

J. Clement Johnston
Counsel

October 2, 1974

Hon. John T. Curtin
United States District Court
United States Courthouse
Niagara Square
Buffalo, New York 14202

Re: Civ-1967-182 Joseph Less v. Taber
Inst. Co., et al
Civ-1967-190 Junia E. Raab v. Taber
Inst. Co., et al

Dear Judge Curtin:

Mr. David Sweet's letter to you dated October 1, 1974, re the above matter contains some statements which are incorrect and the undersigned feel you should not be left misinformed.

The only offer of settlement made to Mr. Sweet was in the sum of $400,000 before your honor in the status report of September 24, 1974. No offer of $500,000 was made "more than two months ago" nor referred to before your honor. No offer of $492,500 was made October 1st at a meeting of counsel. Certain of defense counsel discussed contributions which would be made towards a settlement and one of defense counsel agreed to discuss an increase in contribution with the client if Mr. Sweet would state the acceptance of the total settlement sum then being discussed.

Sincerely,

Edward D Siemer

Edward D. Siemer

Deanne C Siemer

Deanne C. Siemer

Robert M. Hitchcock

Arnold M. Zelman

Harold J Boreanaz

Harold J. Boreanaz

Victor T Fuzak

Victor T. Fuzak

cc: David L. Sweet, Esq.

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

MEMORANDUM

TO: File

FROM: DLS

DATE: July 15, 1975

RE: Raab vs. Taber Instrument Corp.

Deanne Siemer called me this morning at about 10:15 A.M. She said that she had not approached the other defendants about making a settlement contribution and that she thought that it was my place to do so. I told her that we had made our position clear at the last conference before Judge Curtin and understood that she was to contact the defendants and then get in touch with us. She then insisted that I be the one to contact atleast Runfola and Fuzak and she said that she would call Hitchcock. She wouldn't tell me how much her clients would contribute towards the settlement and she mentioned the $5500. figure again. I ask her how much she wanted in contribution from the other defendants and she would not give me a figure, but said that she atleast wanted an indication that they would be willing to contribute something. I reminded her thatwe had gone from $32,500 to $22,000.00 and that we were at the end of the line, and that the only way to get the case settled,

Memorandum
July 15, 1975
Page 2

it appeared to us, was for her to get together with the defendants and come up with a combined settlement fund.

I then told her that since she insisted upon it I would contact Runfola & Fuzak and let her know what they said.

I then called Runfola and reviewed with him the recent negotiations and brought him up to date and told him the reason for my call. He said that he would have to talk to his client as to whether he would contribute anything, and if so, how much, and that he would get in touch with Miss Siemer.

I then called Victor Fuzak and gave him the same information and he also said that he would contact Miss Siemer.

Following my conversations with Runfola & Fuzak, I called Deanne Siemer and told her what they had said. She said that she would try to contact them this afternoon, if she didn't hear from them by then.

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

July 25, 1975

Miss Deanne C. Siemer
Falk, Siemer, Glick, Tuppen & Maloney
Attorneys at Law
2200 Erie County Savings Bank Building
Buffalo, New York 14202

Re: Raab vs. Taber Instrument Corporation, et al
Civil Action No. 1967-190

Dear Miss Siemer:

This will confirm today's telephone conversation. You informed me that you had been unable to give further attention to settlement of this case since our meeting on July 17, 1975, because you had been away on other engagements and that you would now contact your clients and the other defendants in this regard and advise us.

In light of your recent reference in the course of settlement discussions to David Montgomery's evaluation of the Less case, we asked Mr. Montgomery to review the Raab case and give us his evaluation of it for settlement purposes. He has done so and has sent us his opinion under date of July 18, 1975, a copy of which is enclosed.

We will await further word from you which we would expect will be forthcoming shortly.

COPY

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS:gs
Enc.
CC: Hon. John T. Curtin
Ross L. Runfola, Esq.
Robert M. Hitchcock, Esq.
Victor T. Fuzak, Esq.
David E. Montgomery, Esq.

Supplemental Affidavit of David L. Sweet, in Support of Motion to Set Aside Judgment of Dismissal.

HEFFERNAN, SWEET & MURPHY
ATTORNEYS AT LAW
1202 MARINE TRUST BLDG.
BUFFALO, N.Y. 14203

JAMES P. HEFFERNAN
DAVID L. SWEET
EUGENE J. MURPHY

TELEPHONE 854-5960
AREA CODE 716

July 28th,
1975

Miss Deanne C. Siemer
Ross L. Runfola, Esq.
Robert M. Hitchock, Esq.
Victor T. Fuzak, Esq.

Dear Miss Siemer and Gentlemen :

It appears in order to review discussions at the meeting with Judge Curtin on July 17th, 1975, and clarify the course of settlement negotiations.

At the conclusion of that meeting Judge Curtin told Mr. Heffernan that counsel for the defendants were going to confer with their principals and one another and that we should contact Miss Siemer in about a week as to their collective offer. Accordingly, we called her on July 25th, and she said that she had not had an opportunity to contact the other defendants but would do so and advise us. However, in her letter of that date she suggests that we negotiate separately with the other defendants. That course seems pointless, especially without an indication as to the amount her clients are willing to contribute.

We suggest that you confer among yourselves as to your respective contributions and advise us of your collective offer, which we will then promptly report to our client and the Court.

We trust that your response will be forthcoming shortly.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By: David Sweet

DLS:K

cc:

Hon. John T. Curtin

Plaintiff's Memorandum in Support of Motion to Set Aside Judgment of Dismissal (Erroneously dated January 9, 1976).

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,
Plaintiff

-vs- CIVIL NO. 1967 - 190

TABER INSTRUMENT CORPORATION,
et al
Defendants

PLAINTIFF'S MEMORANDUM

At the proceedings in Court on February 5, 1976 defendants' counsel, with the exception of Mr. Hitchcock, indicated they were not willing to sign the stipulation for a remand which the plaintiff prepared and circulated in accordance with the court's request of January 26, 1976. The court thereupon expressed doubt as to its jurisdiction to consider and act upon the plaintiff's motion under Rule 60(b) .

Notwithstanding the authorities cited by defendants to the contrary, under the procedure approved by the Second Circuit Court of Appeals, during the pendency of an appeal, the district court may entertain and consider a motion for relief under Rule 60(b) , and if indicates that it is inclined to grant it, application can then be made to the appellate court for a remand for that purpose.

If the district court decides to deny the motion under Rule 60(b), it should so indicate, so that the appellate court can review the district court's conclusion on the motion, together with its review of the original judgment.

This procedure was expressly approved by the Second Circuit Court of Appeals in Ryan vs. United States Lines Company, C.A. 2d, 1962, 303 F.2d 430, wherein the Court stated at page 434 :

> "In Smith v. Pollin, the Court of Appeals for the District of Columbia Circuit prescribed the procedure it found implied in the analogous Criminal Rule 33, 18 U.S.C.A. for civil cases as well. Under this procedure, the district court is first to determine whether it would grant the motion; if it decides in favor of it, then and then only is the necessary remand by the court of appeals to be sought. In the case at bar, Judge Levet indicated that he would deny the motion.
>
> We agree that the docketing of an appeal ousts the district court of jurisdiction except insofar as it is reserved to it explicitly by statute or rule. We also agree that the procedure prescribed in Smith v. Pollin is proper and calculated to be most economical of the effort of courts and parties. Although here the district court has of necessity entered no 'order' which we could reverse, and appellant's 'notice of appeal' from it is therefore a technical nullity, considerations

> of judicial efficiency likewise impel us to review Judge Levet's conclusion on this appeal from the original judgment. It would be an absurdity to require appellant to return to the district court after this appeal is decided, there formally moving for a new trial, and then filing a new appeal from the inevitable denial."

Wright, Federal Practice and Procedure, at Section 2873, page 265, discusses with approval cases from the Second Circuit, and other Circuits which follow the above procedure :

> " They hold that during the pendency of an appeal the district court may consider a Rule 60(b) motion and if it indicates that it is inclined to grant it, application then can be made to the appellate court for a remand. This procedure is sound in theory and preferable in practice."
>
> (Citing Ryan vs. United States Lines Company, supra)

As shown above, the court clearly has jurisdiction to consider the plaintiff's motion on its merits and if it decides in plaintiff's favor, a remand can be readily obtained from the Second Circuit Court of Appeals to permit this court to grant an appropriate order vacating the judgment of dismissal and scheduling the case for trial.

As to the merits of the motion, the affidavits and exhibits submitted by plaintiff herewith, when read in conjunction with those previously submitted, clearly show that the judgment of dismissal by the court was erroneously predicated upon misrepresentations, distortions and omissions by counsel for the defendants of material facts and circumstances. In such a case, where there has been no hearing to determine controverted issues of fact, and such misrepresentations, distortions and omissions have subsequently been brought to the attention of the district court, Rule 60 (b) affords the court a means of correcting the erroneous judgment and avoiding the imposition upon the parties and the appellate courts of the burden and expense of prosecuting an otherwise unnecessary appeal.

THE COURT SHOULD EXERCISE THE AUTHORITY GIVEN IT BY RULE 60(b) TO GRANT THE RELIEF REQUESTED.

Respectfully submitted,

HEFFERNAN, SWEET & MURPHY
1202 Marine Trust Building
Buffalo, New York 14203

January 9th, 1976

Decision and Order, Dismissing Plaintiff's Motion to Set Aside Judgment of Dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB,

Plaintiff

-vs- Civil 1967-190

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT,

Defendants

On November 25, 1975, a decision was filed dismissing the complaint for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and a judgment entered on the same day. On December 16, 1975, the plaintiff filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the judgment and to reinstate the action. On December 24, 1975, the plaintiff filed an appeal from the judgment.

The filing of the notice of appeal ousted this court from jurisdiction of this cause. Nevertheless, under the procedures set forth in Ryan v. United States

BEST COPY AVAILABLE

Lines Company, 303 F.2d 430 (2d Cir. 1962), a determination should be made whether or not the motion would be granted if properly before the court. If the answer is affirmative, then the circuit court may direct a remand.

After the filing of the motion, the defendants filed an answer on January 26, 1976 and plaintiff filed a supplemental affidavit and brief on February 11. After careful consideration of the original decision and the papers filed in support of the motion, it is apparent that the issues raised by the plaintiff are appropriate for appeal, but not for argument of a 60(b) motion before the district court. The points made by plaintiff are a rehash of arguments which were made before, or which could have been made at the time of the first argument. Plaintiff's view of the facts and the conclusions to be drawn from the facts is different from that of the court's. I have carefully reviewed the proceedings of the original motion. My conclusion is that the findings of fact and conclusions to be made from these findings were warranted by the history of this litigation. Furthermore, in the present motion, plaintiff fails to discuss many of the material points made in the original decision to dismiss.

In addition, there is an essential failure in plaintiff's motion. Plaintiff's counsel fails to indicate under what subsection of Rule 60(b) the motion is brought. A review of his argument reveals that none of the subsections apply.

The motion is dismissed for lack of jurisdiction.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: March 9, 1976

Notice of Appeal from Order Denying Plaintiff's Motion to Set Aside Judgment of Dismissal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUNIA E. RAAB
Plaintiff

-vs-

CIVIL NO. 1967-190

TABER INSTRUMENT CORPORATION, a New York Corporation, CINDY R. TABER and MARINE MIDLAND BANK-WESTERN, EXECUTORS OF RALPH F. TABER, DECEASED, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT

Defendants

NOTICE OF APPEAL

Notice is hereby given that Junia E. Raab, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the District Court granted in this action on the 9th day of March, 1976, and entered on that date, denying the motion of the plaintiff under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the judgment of dismissal entered on November 25, 1975.

Dated: March 11, 1976

HEFFERNAN, SWEET & MURPHY

BY: David L. Sweet
Attorneys for Plaintiff
1202 Marine Trust Building
237 Main Street
Buffalo, New York 14203
Telephone (716) 854-5960

TO:

JOHN K. ADAMS
Clerk of the Court

FALK, SIEMER, GLICK, TUPPEN & MALONEY
Attorneys for Taber Instrument Corporation
and Cindy R. Taber and Marine Midland Bank-Western,
Executors of Ralph F. Taber, Deceased
2200 Main Place
Buffalo, New York 14202

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH. P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB, and
WARREN J. HILDEBRANDT,

Defendants

PLAINTIFF DEMANDS
TRIAL BY JURY

COMPLAINT

The plaintiff, appearing by his attorneys, HEFFERNAN, HARRISON, SWEET & GRUBER, for his complaint herein alleges:

FIRST CAUSE OF ACTION

Jurisdiction

1) This cause of action arises under §§10(b), 27 and 29(b) of the Securities Exchange Act of 1934 (15 U. S. C. §§78j(b), 78aa, 78cc(b)) and Rule 10b-5 (17 Code Fed. Regs. §240.10b-5), adopted by the Securities and Exchange Commission pursuant to §10(b), copies of which are annexed as Exhibit A and incorporated herein.

Parties

2) The plaintiff, Joseph F. Less, a resident of Grand Island, Erie County, New York, in this district, was one of the founders of the defendant, Taber Instrument Corporation (hereinafter "TIC"), together with the defendant, Ralph F. Taber,

in the year 1940. In January of 1965 the plaintiff was an officer and director of TIC and owned 14,100 shares of its common stock, representing approximately twenty percent of all shares outstanding.

3) The defendant, TIC, is a New York corporation with its principal place of business in North Tonawanda, Niagara County, New York, in this district.

4) The defendant, Ralph F. Taber, is a resident of Amherst, Erie County, New York, in this district, and at all times herein mentioned was the President, Treasurer, a director and the largest shareholder of the defendant, TIC.

5) The defendant, Joseph P. D'Angelo, also known as Frank Weber, is a resident of Orchard Park, Erie County, New York, in this district, and at certain or all times herein mentioned acted either as an executive officer or as agent of the defendant, TIC.

6) The defendant, Benjamin Manasen is a resident of Amherst, Erie County, New York, in this district, and at all times herein mentioned was a director of the defendant, TIC.

7) The defendant, Ervin Himmelfarb, is a resident of Juarez, Mexico.

8) The defendant, Warren J. Hildebrandt, is a resident of North Tonawanda, Niagara County, New York, in this district, and at all times herein mentioned was the Secretary and a director of the defendant, TIC.

Underlying Facts

9) On or about January 21, 1965, the plaintiff was discharged as an officer and employee of TIC.

10) Thereafter TIC, through the defendant D'Angelo, made several offers to purchase the plaintiff's 14,100 shares at prices up to $5 per share, representing that those prices were fair and reasonable in the judgment of the TIC management. The plaintiff rejected those offers on the ground that the TIC balance sheet as of December 31, 1964, showed a book value of approximately $16 per share.

11) In March of 1966, Noel E. Bartlo, Esquire, a Buffalo lawyer, offered to buy all of the plaintiff's TIC stock on behalf of an undisclosed principal at $5 per share. The plaintiff referred Mr. Bartlo to his attorneys, to whom Mr. Bartlo repeated the offer, increasing the price to $8 per share. Thereafter Mr. Bartlo made several further offers and on or about March 28, 1966, indicated that his principal might pay as much as $145,000 for the stock, which was more than $10 per share.

12) On or about March 30, 1966, the plaintiff brought the Bartlo offer to the attention of the defendant Taber, who stated that he was very interested in acquiring the stock and would have the defendant Hildebrandt get in touch with the plaintiff shortly.

13) On or about April 1, 1966, pursuant to a telephone call from the defendant Hildebrandt to the plaintiff's attorneys, a conference was held in the office of Charles J. McDonough, Esquire, attorney for TIC, at which the plaintiff and his attorneys disclosed the nature of the Bartlo offers to Mr. McDonough and the defendant Hildebrandt and stated that they suspected that the unknown principal for whom Mr. Bartlo was acting was in fact the defendant D'Angelo.

14) The next day, Saturday, April 2, 1966, the defendant D'Angelo informed the plaintiff by telephone that he knew of the prior day's meeting and advised him not to do anything about selling the stock until he, D'Angelo, could meet with him on the following Monday. At that time the defendant D'Angelo appeared at the plaintiff's place of business, told him that he was the party for whom Mr. Bartlo had been acting, stated that he was attempting to get the stock for certain other individuals who were interested in taking a larger part in the operations of TIC, and made a further oral offer to buy the plaintiff's stock.

15) On the same day one of the plaintiff's attorneys, David L. Sweet, informed Mr. McDonough, TIC's attorney, of the D'Angelo offer. And on or about April 6, 1966, the plaintiff agreed to sell his stock to TIC at $10 per share, for a total of $141,000, on the basis of a down payment of $36,000 with the balance to be paid in quarterly installments.

16) In the course of these negotiations, it was represented to David L. Sweet that under the circumstances, a price of $10 per share was fair and reasonable in the judgement of the TIC management.

17) Shortly before the scheduled closing date of May 4, 1966, Mr. McDonough informed the plaintiff's attorneys that his client had obtained a loan with which it could pay cash for the stock, and the transaction was closed on that date by the delivery of a TIC check in the full amount of the purchase price.

18) Pursuant to an agreement made between counsel at

the closing, Mr. McDonough sent to the plaintiff's attorneys on May 19, 1966, an instrument purporting to be a certified copy of a resolution authorizing the purchase of the plaintiff's stock that had been adopted at a special meeting of the board of directors of TIC on May 5, 1966.

19) None of the defendants ever disclosed, either to the plaintiff or to his attorneys, certain facts material to the value of his shares, and the plaintiff did not discover those facts until some time after the closing on May 4, 1966, namely: (a) that active negotiations had taken and were taking place between representatives of TIC, including the defendants Taber and D'Angelo, and representatives of Teledyne, Inc., a Delaware corporation with its principal offices in Hawthorne, California, and its stock traded on the New York and Pacific Coast Stock Exchanges, looking to the acquisition of TIC by Teledyne; (b) that prior to the closing on May 4, 1966, those negotiations had resulted in an agreement in principle on the acquisition of TIC's assets by Teledyne for a price greatly in excess of their book value; and (c) that the Teledyne shares received by TIC in exchange for its assets would be distributed as a liquidating dividend to TIC's stockholders.

20) If the plaintiff had known the facts alleged in paragraph 19 he would not have agreed to sell his TIC shares at the price he received.

21) On or about December 30, 1966, Teledyne did in fact acquire the assets of TIC in consideration of 45,000 shares of Teledyne stock, which, pursuant to a plan of liquidation and dissolution adopted by TIC at about the same time,

were to be distributed to the shareholders of TIC in proportion to their stock ownership.

22) If the plaintiff had remained a stockholder of TIC, he would have been entitled to receive on TIC's liquidation a great deal more than the $141,000 paid for his shares by TIC.

23) TIC, aided and abetted by the individual defendants, transferred the 14,100 shares purchased from the plaintiff to the defendants D'Angelo and Himmelfarb in furtherance of a scheme and conspiracy of the defendants to defraud the plaintiff, and the defendants D'Angelo and Himmelfarb received those shares in furtherance of that scheme and conspiracy and with knowledge of the manner in which the shares had been acquired from the plaintiff by TIC as well as the nondisclosure to the plaintiff of the prior negotiations and agreement with Teledyne.

24) The defendants TIC, Taber, D'Angelo and Hildebrandt participated directly in the purchase of the plaintiff's stock. The defendant Manasen participated in the purchase as a director of TIC in that he authorized and approved the negotiations for the purchase. All the defendants knew of the undisclosed facts specified in paragraph 19.

25) On or about October 20, 1966, TIC's attorney advised the plaintiff's attorneys that Teledyne was not satisfied with the form of release given by the plaintiff at the closing on May 4, 1966, and that he had been asked to obtain a release against any possible claim arising out of the TIC acquisition by Teledyne. The plaintiff through his attorneys rejected this request and on November 3, 1966, put both TIC

and Teledyne on formal notice that the plaintiff intended to make a claim based on the misstatements and omissions to disclose pleaded herein. Subsequent offers of additional payment to the plaintiff for a release that were made by TIC's counsel, as well as the defendant D'Angelo purportedly on behalf of the defendant Manasen, were rejected by the plaintiff. And, on information and belief, it was agreed between TIC and Teledyne that the certificate for 45,000 Teledyne shares that was issued to TIC on December 30, 1966, would not be transferred to TIC's stockholders until execution of an agreement to escrow 3,500 of the 45,000 shares pending the outcome of any action that might be brought by the plaintiff.

26) The defendants, directly and indirectly, by use of means and instrumentalities of interstate commerce and of the mails, (1) employed a device, scheme, or artifice to defraud the plaintiff, (2) made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (3) engaged in acts, practices, and a course of business which would operate and in fact operated as a fraud or deceit upon the plaintiff, all in connection with the purchase of his TIC shares as herein alleged.

27) The contract between the plaintiff and the defendant TIC was made by TIC in violation of Rule 10b-5 and §10(b), the violation being aided and abetted by the other defendants, and that contract is void under §29(b) as regards the rights of all the defendants.

SECOND CAUSE OF ACTION

28) This cause of action is based on pendent jurisdiction.

29) Paragraphs 2-25 are incorporated by reference.

THIRD CAUSE OF ACTION

30) Paragraphs 1-26 are incorporated by reference.

31) The contract between the plaintiff and the defendant TIC was made by TIC in violation of Rule 10b-5 and §10(b), the violation being aided and abetted by the other defendants, and the plaintiff was damaged as a result.

FOURTH CAUSE OF ACTION

32) Paragraphs 2-25 and 28 are incorporated by reference.

33) The plaintiff was damaged as a result.

PRAYER

WHEREFORE the plaintiff demands against each of the defendants:

(a) Judgment that the purchase of the plaintiff's 14,100 shares of TIC be rescinded and that there be distributed to the plaintiff upon the liquidation of TIC that portion of the 45,000 Teledyne shares that the plaintiff's 14,100 shares of TIC bear to the total outstanding shares of TIC, or the monetary equivalent of that portion; and, on condition of full satisfaction of any such judgment that may be awarded, the plaintiff tenders restitution of all that he received under the purchase contract;

(b) Judgment for his damages in the amount of $1,400,000.00 if the rescission demanded in Clause (a) of this prayer is for any reason denied;

(c) Interest, costs, and such further relief as to the Court may seem just and proper.

HEFFERNAN, HARRISON, SWEET & GRUBER

By

Office and Post Office Address
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Buffalo, New York 14203

LOUIS LOSS

Langdell Hall
Cambridge, Massachusetts 02138
Of counsel

ATTORNEYS FOR PLAINTIFF

Dated: May 8, 1967

EXHIBIT A

§ 78j(b) Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

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(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 10, 48 Stat. 891.

§ 78aa Jurisdiction of offenses and suits

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisidiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts. June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921, June 25, 1948, c. 646, § 32(b) 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§ 78cc Validity of contracts

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(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the perfromance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

§240.10b-5 Employment of manipulative and deceptive devices by any purchaser of a security. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Answer of Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt.

UNITED STATES DISTRICT COURT : WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS

Plaintiff

-vs-

CIVIL ACTION
No. 1967-182

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO also known as FRANK WEBER, BENJAMIN MANASEN, ERVIN HIMMELFARB and WARREN J. HILDEBRANDT

Defendants

The defendants TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT, appearing herein by their attorneys McDONOUGH, BOASBERG, McDONOUGH & BELTZ, in answer to the plaintiff's complaint:

1. Admit the allegations contained in Paragraphs "3", "4", "7", "8", "9", "18" and "21" thereof.

2. Deny having knowledge or information sufficient to form a belief as to Paragraphs "1", "11", "13", "14", "15", "17", "25" and "28" thereof.

3. Deny the allegations contained in Paragraphs "5", "10", "12", "16", "19", "20", "22", "23", "24", "26", "27", "31" and "33" thereof.

4. Admit the allegations contained in Paragraphs "2" thereof, except that the answering defendants deny that the plaintiff was one of the founders of TABER INSTRUMENT CORPORATION.

5. With reference to Paragraph "6" of the plaintiff's complaint, the answering defendants admit that the defendant BENJAMIN MANASEN has been a director of the defendant TABER INSTRUMENT CORPORATION since December 8, 1965.

6. Deny the allegations contained in Paragraphs "29", "30" and "32" thereof, except insofar as the earlier paragraphs of said complaint, incorporated by reference therein, are earlier admitted herein.

FOR A FIRST SEPARATE AFFIRMATIVE DEFENSE, THE ANSWERING DEFENDANTS ALLEGE:

7. That the plaintiff's complaint fails to state a claim against the answering defendants upon which relief can be granted.

FOR A SECOND SEPARATE AFFIRMATIVE DEFENSE, THE ANSWERING DEFENDANTS ALLEGE:

8. That for many years, commencing in 1940, the plaintiff JOSEPH F. LESS was an employee of the defendant TABER INSTRUMENT CORPORATION; that he thereafter became a stockholder and an officer of said corporation, to wit: Vice-President in charge of manufacturing; and that on or about January 25, 1957, he was elected a director of TABER INSTRUMENT CORPORATION.

9. That thereafter, and up to and including January 29, 1965, the plaintiff continued in the employ of the

defendant TABER INSTRUMENT CORPORATION, and as Vice-President in charge of manufacturing, since about 1942, was plant manager of the defendant corporation's manufacturing plant; and continued to act as and perform the duties of a director of said corporation until he resigned as a director of said corporation, on or about February 15, 1965.

10. That on or about August 30, 1960, DONALD J. LESS, who is a son of the plaintiff JOSEPH F. LESS, entered the employ of the defendant TABER INSTRUMENT CORPORATION, as a project engineer, pursuant to a written contract of employment.

11. That for some years prior to 1965, DONALD E. JOSLYN, who is a son-in-law of the plaintiff JOSEPH F. LESS, and STANLEY C. LESS, who is a brother of the plaintiff JOSEPH F. LESS, were also employees of the defendant TABER INSTRUMENT CORPORATION.

12. That for many years prior to 1965, the defendant TABER INSTRUMENT CORPORATION was engaged in the research, development, manufacture and distribution and sale of precision machinery, equipment and instruments of various kinds.

13. That in and about the year 1954, the defendant TABER INSTRUMENT CORPORATION began the research and experiment upon, development, manufacture and eventual sale and distribution of pressure transducers, which are instruments for the electrical measurement of fluid pressure of liquids and gases.

14. That from the original date of his employment in 1960, the aforesaid DONALD J. LESS was assigned by the defendant TABER INSTRUMENT CORPORATION as a project engineer, in the research, experiment, development and production of transducers, under the direction of the defendant RALPH F. TABER, who was President and chief engineer of the defendant TABER INSTRUMENT CORPORATION; and that the duties of the said DONALD J. LESS were chiefly the application and testing of theories, ideas and designs of said pressure transducers, which were submitted to the said DONALD J. LESS by the defendant RALPH F. TABER.

15. That between 1954 and 1965, the mechanical parts of said pressure transducers, which had been designed and developed by the defendant TABER INSTRUMENT CORPORATION as aforesaid, were manufactured under the supervision of the plaintiff JOSEPH F. LESS, as plant manager and Vice-President of TABER INSTRUMENT CORPORATION.

16. That the design, research, experiments, development and manufacture of the aforesaid pressure transducers by the defendant TABER INSTRUMENT CORPORATION involved the knowledge and use of certain valuable trade secrets, secret processes,patterns, devices, information and knowledge, to all of which the plaintiff JOSEPH F. LESS and the said DONALD J. LESS had access and knowledge of which they acquired by reason of their employment by the defendant TABER INSTRUMENT CORPORATION, as aforesaid.

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17. That by reason of the said employment by the defendant TABER INSTRUMENT CORPORATION, and by reason of the fact that the plaintiff JOSEPH F. LESS was an officer and director of TABER INSTRUMENT CORPORATION, as aforesaid, a fiduciary relationship existed between the plaintiff JOSEPH F. LESS and the said DONALD J. LESS and the defendant TABER INSTRUMENT CORPORATION.

18. That on or about January 11, 1965, the plaintiff JOSEPH F. LESS, the said DONALD J. LESS, the said DONALD E. JOSLYN and others, caused and brought about the incorporationof Viatran Corporation, a domestic corporation, the principal office and place of business of which was located at No. 405 Rhode Island Street in the City of Buffalo, New York, within the Western District of New York.

19. That at all times herein mentioned, the plaintiff JOSEPH F. LESS, together with the said DONALD J. LESS and DONALD E. JOSLYN, were and are the principal stockholders, as well as officers and directors of the said Viatran Corporation.

20. That at all times herein mentioned, the said Viatran Corporation was and is engaged in the manufacture, distribution and sale of pressure transducers, among other things.

21. That commencing on or about August 30, 1960, and continuing up to and including the year 1965, the plaintiff JOSEPH F. LESS and the aforesaid DONALD J. LESS and DONALD E. JOSLYN, and others, confederated/conspired and agreed among themselves,

and with other persons and corporations, particularly, the said Viatran Corporation, subsequent to its incorporation, to defraud and deceive the defendant TABER INSTRUMENT CORPORATION, and to illegally divert from the defendant TABER INSTRUMENT CORPORATION, and to procure for their own use and benefit, and for the use and benefit of the said Viatran Corporation, the property rights and business of the defendant TABER INSTRUMENT CORPORATION, in the development, manufacture, distribution and sale of pressure transducers; to compete with the defendant TABER INSTRUMENT CORPORATION, in said business; and to illegally and improperly use the defendant TABER INSTRUMENT CORPORATION'S aforesaid trade secrets, secret and confidential information, designs and technical and engineering knowledge acquired as aforesaid by the plaintiff JOSEPH F. LESS and the said DONALD J. LESS and DONALD E. JOSLYN, by reason of their employment by the defendant TABER INSTRUMENT CORPORATION; and by reason of the fact that the plaintiff JOSEPH F. LESS was an officer, and director of TABER INSTRUMENT CORPORATION, as aforesaid.

22. That as part of said conspiracy, breach of fiduciary relationship and illegal diversion and misappropriation of the defendant TABER INSTRUMENT CORPORATION'S business, property, rights and trade secrets and confidential information, the plaintiff JOSEPH F. LESS, after leaving the employment of the defendant TABER INSTRUMENT CORPORATION, proceeded to assemble, manufacture, distribute and sell pressure transducers through the said Viatran Corporation and elsewhere, using in connection therewith the designs, trade secrets, secret processes, secret

confidential knowledge and information of the defendant TABER INSTRUMENT CORPORATION, which was acquired by the said JOSEPH F. LESS and others, as aforesaid.

23. That for a long time prior to January 29, 1965, the plaintiff JOSEPH F. LESS illegally converted and misappropriated the property of the defendant TABER INSTRUMENT CORPORATION to his own use and benefit, by various means, including the direction of other employees of the defendant TABER INSTRUMENT CORPORATION to perform work, labor and services at the said JOPSEH F. LESS' home and elsewhere,upon TABER INSTRUMENT CORPORATION'S time; by charging to the defendant TABER INSTRUMENT CORPORATION'S account various materials, work, labor and services furnished and performed by various persons and corporations for the plaintiff JOSEPH F. LESS' individual benefit; and by using the business hours for which he was paid by TABER INSTRUMENT CORPORATION, as well as materials and property of the defendant TABER INSTRUMENT CORPORATION, for the manufacture and construction of various articles of machinery and equipment for the said plaintiff JOSEPH F. LESS' own use and benefit.

24. That on or about August 30, 1965, the defendant TABER INSTRUMENT CORPORATION instituted an action in the Supreme Court of the State of New York, Erie County, against the plaintiff JOSEPH F. LESS, DONALD J. LESS, DONALD E. JOSLYN, VIATRAN CORPORATION, and others, for permanent injunction, enjoining and restraining all of the defendants from further manufacturing, distributing or selling pressure transducers, and from the

further use of the defendant TABER INSTRUMENT CORPORATION'S trade secrets, designs, improvements, engineering skills, confidential knowledge and information relative to the development, manufacture and distribution and sale of pressure transducers, as well as other injunctive relief. The complaint in said action also demanded damages in the sum of $200,000.00, an accounting of large profits alleged to have been made by the defendants in said action in the manufacture, sale and distribution of said pressure transducers. The complaint also demanded judgment in the further sum of $50,000.00 against the present plaintiff JOSEPH F.LESS alone, for conversion of TABER INSTRUMENT CORPORATION'S property, as hereinabove set forth.

25. That on or about September 27, 1965, the defendants VIATRAN CORPORATION, JOSEPH F. LESS, DONALD J. LESS and DONALD E. JOSLYN appeared in said action by their attorneys COFFEY, HEFFERNAN and HARRISON, and interposed an answer denying the material allegations of the complaint, and setting up certain affirmative defenses with respect thereto.

26. That thereafter, a note of issue was filed in said action and the said action was placed upon the trial calendar of Supreme Court, Erie County.

27. The plaintiff JOSEPH F. LESS, as well as the said DONALD J. LESS and STANLEY LESS, as employees of TABER INSTRUMENT CORPORATION for some years, were all participants in a certain profit Sharing Retirement Plan which the defendant TABER INSTRUMENT CORPORATION had established for the benefit

of its employees in 1953.

28. That on October 14, 1965, the plaintiff JOSEPH F. LESS instituted an action in the Supreme Court of the State of New York, Erie County, demanding a declaratory judgment that he was entitled to payment of $52,046.35, as benefits under said TABER INSTRUMENT CORPORATION Profit Sharing Retirement Plan.

29. That on October 14, 1965, DONALD J. LESS instituted an action in the Supreme Court of the State of New York, Erie County, demanding a declaratory judgment that he was entitled to payment of $1,701.89, as benefits under said TABER INSTRUMENT CORPORATION Profit Sharing Retirement Plan.

30. That on October14, 1965, STANLEY C. LESS instituted an action in the Supreme Court of the State of New York, Erie County demanding a declaratory judgment that he was entitled to payment of $18,037.69, as benefits under said TABER INSTRUMENT CORPORATION Profit Sharing Retirement Plan.

31. In each of said actions brought by the plaintiff JOSEPH F. LESS, DONALD J. LESS and STANLEY C. LESS as aforesaid, in addition to TABER INSTRUMENT CORPORATION, the defendants RALPH F. TABER and WARREN J. HILDEBRANDT "as individuals and as Trustees of the Board and as membersof the Profit Sharing Committee of Taber Instrument Corporation Profit Sharing Retirement Plan" were also named as defendants.

32. All of the defendants in the aforesaid three actions appeared by McDONOUGH, BOASBERG, McDONOUGH &

BELTZ, their attorneys, and in each action interposed an answer denying the material allegations of each plaintiff's complaint, and set up in each action an affirmative defense, alleging, in substance, that neither the plaintiff nor any other employees of TABER INSTRUMENT CORPORATION had made any contribution toward the establishment, administration or financing of the Profit Sharing Retirement Plan; that it was not part of any employment contracts; that the Profit Sharing Retirement Plan was established by TABER INSTRUMENT CORPORATION "for the sole purpose of rewarding its employees for long, loyal and faithful service - - -", and that "loyal, faithful service by the participants - - - - was a condition precedent, express or implied, to the defendants' obligation and agreement to make payments to participants under the terms and conditions of the said Profit Sharing Retirement Plan."

33. In each of the aforesaid three actions, the defendant's affirmative defense further alleged:

> "That for a long time prior to (the date of termination of each plaintiff's employment) the plaintiff failed to render loyal and faithful service to his employer, the defendant TABER INSTRUMENT CORPORATION, but on the contrary, was unfaithful and disloyal to his said employer and to the duties and obligations imposed upon the plaintiff by his said employment"

and that by reason of the breach of a fiduciary relationship existing between each said plaintiff and TABER INSTRUMENT

CORPORATION, the plaintiffs were not entitled to any payment or payments as alleged participants in the said Profit Sharing Retirement Plan.

34. In the action instituted by JOSEPH F.LESS, as plaintiff, as aforesaid, with respect to said Profit Sharing Retirement Plan, the defendant's answer set up a counterclaim in the sum of $50,000.00 for the same alleged illegal conversion and misappropriation of the TABER INSTRUMENT CORPORATION'S property, which was the basis of the fourth cause of action in TABER INSTRUMENT CORPORATION'S aforesaid action in Supreme Court, Erie County, against JOSEPH F. LESS, as a defendant therein.

35. Notes of issue were thereafter filed in each of said actions, and each of said actions was placed upon the trial calendar of Supreme Court, Erie County.

36. Thereafter, the parties to the aforesaid actions pending in Supreme Court, Erie County, and their attorneys, entered into negotiations for the compromise, settlement and discontinuance of all of said actions, which included, as an integral part thereof, negotiations for the purchase of the plaintiff JOSEPH F. LESS' 14,100 shares of stock in TABER INSTRUMENT CORPORATION.

37. That on or about April 13, 1966, an agreement of settlement and compromise was reached between the plaintiff JOSEPH F. LESS, and the defendants TABER INSTRUMENT CORPORATION, RALPH F. TABER and WARREN J. HILDEBRANDT, wherein and whereby

TABER INSTRUMENT CORPORATION agreed to discontinue its action against JOSEPH F. LESS, DONALD J. LESS, DONALD E. JOSLYN and VIATRAN CORPORATION and others, and to execute and deliver a general release to all of the defendants named in said action, as well as other persons and corporations, as well as granting the named defendants and other releasees named in said general release, certain further rights with respect to the development, design, production and sale of pressure transducers and other equipment.

38. As a further integral part of said compromise and settlement, the defendants, in the said three actions, arising out of the TABER INSTRUMENT CORPORATION Profit Sharing Plan, to wit, TABER INSTRUMENT CORPORATION, RALPH F. TABER and WARREN J. HILDEBRANDT, individually and as trustees, agreed to pay to the plaintiffs in each of said pending actions, the following amounts in settlement of their claims for benefits under said Profit Sharing Plan:

JOSEPH F. LESS, $52,046.36; DONALD J. LESS, $1,701.89;
and STANLEY C. LESS, $18,037.69;

and the three plaintiffs in the said three actions, to wit: JOSEPH F. LESS, STANLEY C. LESS and DONALD J. LESS agreed to execute and deliver general releases to TABER INSTRUMENT CORPORATION, RALPH F. TABER and WARREN J. HILDEBRANDT, their successors, assigns, heirs, executors and administrators.

39. That as an integral part of said agreement of compromise and settlement, the defendant TABER INSTRUMENT

CORPORATION agreed to purchase the aforesaid shares of stock of the plaintiff JOSEPH F. LESS in TABER INSTRUMENT CORPORATION to wit, 14,100 shares, at a price of $10.00 per share, in the total amount of $141,000.00.

40. That thereafter and on or about May 4, 1966, as an integral part of said compromise and settlement agreement, the defendant TABER INSTRUMENT CORPORATION paid to the plaintiff JOSEPH F. LESS the sum of $141,000.00 in payment for said 14,100 shares of JOSEPH F. LESS'Class B common stock of TABER INSTRUMENT CORPORATION, and the plaintiff JOSEPH F. LESS duly assigned said shares to TABER INSTRUMENT CORPORATION; said assignment, on information and belief, having been executed on April 13, 1966.

41. That on or about May 4, 1966, as an integral part of said compromise and settlement agreement, TABER INSTRUMENT CORPORATION, RALPH F. TABER and WARREN J. HILDEBRANDT, individually, and as trustees of the Board and as members of TABER INSTRUMENT CORPORATION Profit Sharing Retirement Plan, paid to JOSEPH F. LESS the sum of $52,046.36; to STANELY C. LESS, the sum of $18,037.69 and to DONALD J. LESS the sum of $1701.89, as aforesaid.

42. That on or about May 4, 1966,as an integral part of said compromise and settlement agreement, TABER INSTRUMENT CORPORATION and RALPH F. TABER duly executed and delivered to JOSEPH F. LESS, DONALD J. LESS, STANLEY C. LESS and VIATRAN CORPORATION and others, a general release, as aforesaid.

43. That on or about May 4, 1966, as an integral part of said compromise and settlement agreement, JOSEPH F. LESS, STANLEY C. LESS and DONALD J. LESS duly executed and delivered to TABER INSTRUMENT CORPORATION, RALPH F. TABER and WARREN J. HILDEBRANDT, general releases as aforesaid.

44. That onor about May 4, 1966,as an integral part of said compromise and settlement agreement, all of the parties to the four abovementioned actions, then pending in Supreme Court, Erie County, through their respective attorneys, executed and delivered stipulations of discontinuance, discontinuing each of said four actions, "on the merits, with prejudice, without costs to any party"; and that stipulations of discontinuance were thereafter duly filed in the Erie County Clerk's office.

FOR A THIRD SEPARATE AFFIRMATIVE DEFENSE,
THE ANSWERING DEFENDANTS ALLEGE:

45. Repeat and reallege each and every allegation in this answer contained, as though again fully set forth herein.

46. That by reason of the premises, the plaintiff JOSEPH F. LESS has accepted and retained consideration and benefits of great value, as part of said compromise and settlement agreement, and has failed to return or restore the consideration and benefits running to the plaintiff, to DONALD E. JOSLYN, DONALD J. LESS, to STANLEY C. LESS, to VIATRAN CORPORATION, and to other persons and corporations on behalf of the plaintiff JOSEPHF. LESS

47. That by reason of the premises, the plaintiff JOSEPH F. LESS is estopped to deny the validity of the sale of his 14,100 shares of stock to the defendant TABER INSTRUMENT CORPORATION, as part of said agreement of compromise and settlement; and is estopped to assert the claim or claims set forth in the plaintiff's complaint in the present action.

FOR A CROSS-CLAIM AGAINST THE DEFENDANTS
ERVIN HIMMELFARB and JOSEPH P. D'ANGELO,
THE ANSWERING DEFENDANTS FURTHER ALLEGE:

48. Repeat and reallege each and every allegation contained in this answer, as though again fully set forth herein.

49. That on or about July 7, 1966, the defendant TABER INSTRUMENT CORPORATION sold and delivered 7100 shares of the said corporation's Class B stock, to ERVIN HIMMELFARB, at a price of $10.00 per share, or a total purchase price of $71,000.00, paid by the said ERVIN HIMMELFARB.

50. That the defendant TABER INSTRUMENT CORPORATION thereafter sold and delivered to the defendant JOSEPH P. D'ANGELO, 7000 shares of the said corporation's Class B stock, at a price of $10.00 per share, or a total purchase price of $70,000.00 paid by the said JOSEPH P. D'ANGELO.

51. That any gains or benefit, .by reason of the purchase, sale and ownership of said 14,100 shares of TABER INSTRUMENT CORPORATION'S Class B stock, arising out of the

contract between TABER INSTRUMENT CORPORATION and TELEDYNE, INC., as alleged in the plaintiff's complaint, ran solely and exclusively to the defendants ERVIN HIMMELFARB and JOSEPH P. D'ANGELO; and that no benefit or consideration therefrom ran to either of the defendants TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN or WARREN J. HILDEBRANDT.

52. On information and belief, if the answering defendants TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT, or either of them, are found liable for damages or other relief in this action, to the plaintiff JOSEPH F. LESS, the defendants ERVIN HIMMELFARB and JOSEPH P. D'ANGELO will be liable over, jointly and severally, to the answering defendants TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT, for said damages or other relief found against the answering defendants in favor of the plaintiff JOSEPH F. LESS.

WHEREFORE, the answering defendants demand judgment as follows:

a) Dismissing the plaintiff's complaint with costs

b) In the event that the plaintiff JOSEPH F. LESS shall recover damages or have other relief against the answering defendants, the answering defendants TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT, have judgment over against the defendants, ERVIN HIMMELFARB and JOSEPH P. D'ANGELO, jointly and severally, for all damages or other relief, with costs.

Dated: May 24, 1967

McDONOUGH BOASBERG McDONOUGH & BELTZ
Attorneys for the Answering Defendants,
TABER INSTRUMENT CORPORATION
RALPH F. TABER
BENJAMIN MANASEN
WARREN J. HILDEBRANDT

by

CHARLES J. McDONOUGH
Office and P. O. Address
930 Walbridge Building
Buffalo, New York 14202

Answer of Defendant, Joseph P. D'Angelo filed June 19, 1967.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB, and
WARREN J. HILDEBRANDT,

Defendants

ANSWER

Civil Action
No. 1967-182

Defendant, Joseph P. D'Angelo, by his attorneys, Phillips, Lytle, Hitchcock, Blaine & Huber, as and for his answer to the complaint herein, alleges:

1. Denies each and every allegation contained in paragraphs numbered 23, 28 and 33 thereof.

2. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 6, 7, 8, 12, 13, 15, 16, 17, 18, 20 and 22 thereof.

3. Denies each and every allegation contained in paragraph 1 thereof except that Exhibit A attached to the complaint contains correct copies of the law and the Rule described in said paragraph.

4. Denies knowledge or information sufficient to form a belief as to each allegation contained in paragraph numbered 2 thereof except that he admits that plaintiff is a resident of Grand Island, Erie County, New York.

5. Answering paragraph numbered 5 thereof, admits that he is a resident of Orchard Park, Erie County, New York, and that at certain times mentioned in the complaint he acted either as an Executive Officer or an agent of TIC.

6. Denies each and every allegation contained in paragraph numbered 10 thereof, except that he admits that at various times prior to April 30, 1965 he negotiated in behalf of Taber Instrument Corporation with plaintiff for the purchase by said corporation of 14,100 shares of the stock of said corporation owned by plaintiff.

7. Upon information and belief denies each and every allegation contained in paragraph numbered 11 thereof and with respect thereto alleges upon information and belief that Noel E. Bartlo had negotiations with plaintiff in 1965 and with plaintiff and attorneys representing plaintiff in March, 1966 with respect to the sale of plaintiff's stock in TIC.

8. Denies each and every allegation contained in paragraph numbered 14 thereof and with respect thereto alleges that on or about April 2, 1966 he informed plaintiff, among other things, that several groups were interested in securing plaintiff's said stock, among whom was Teledyne; and that this answering defendant was attempting and intended to attempt to get a company to acquire Taber Instrument Corporation and that he had already contacted several companies including Teledyne.

9. Denies each and every allegation contained in paragraph numbered 19 thereof insofar as they pertain to him.

10. Denies each and every allegation contained in paragraph numbered 24 thereof insofar as the same pertain to him;

and denies knowledge or information sufficient to form a belief insofar as they pertain to others.

11. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in the first two sentences in paragraph numbered 25 thereof; denies knowledge or information sufficient to form a belief as to any offers as therein alleged to have been made by TIC's counsel, and admits that he made a certain offer to plaintiff on the basis that otherwise the negotiations between Taber Instrument Corporation and Teledyne would be terminated; and denies knowledge or information sufficient to form a belief as to the allegations contained in the fourth sentence of said paragraph except that there was an agreement that 3,500 shares of Teledyne stock should be retained pending the outcome of any claims asserted or that might be asserted by anyone with respect to the purchase by Teledyne of the assets of Taber Instrument Corporation.

12. Denies each and every allegation contained in paragraphs numbered 26, 27 and 31 thereof insofar as they pertain to him; and denies any knowledge or information sufficient to form a belief insofar as they pertain to others.

13. Upon information and belief admits the allegations of paragraphs numbered 4 and 21 thereof.

AS A SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES:

14. That the complaint fails to state a claim upon which relief can be granted.

AS A SECOND, SEPARATE AND
COMPLETE DEFENSE THERETO, ALLEGES:

15. Denies that the United States Court for the Western District of New York has jurisdiction over the subject matter of the action.

AS A THIRD, SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES:

16. That the United States Court for the Western District of New York has no jurisdiction over the person of this answering defendant, as plaintiff and said defendant are both citizens of the State of New York.

AS A FOURTH, SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES:

17. That the United States Court for the Western District of New York has no jurisdiction over any of the parties; as complete diversity of citizenship is lacking.

AS A FIFTH, SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES UPON
INFORMATION AND BELIEF:

18. That for many years, commencing in 1940, the plaintiff Joseph F. Less was an employee of the defendant Taber Instrument Corporation; that he thereafter became a stockholder and an officer of said corporation, to wit: Vice-President in charge of manufacturing; and that on or about January 25, 1957, he was elected a director of Taber Instrument Corporation.

19. That thereafter, and up to and including January 29, 1965, the plaintiff continued in the employ of the defendant Taber Instrument Corporation, and as Vice-President in charge of manufacturing, since about 1942, was plant manager of the defendant corporation's manufacturing plant; and continued to act as and perform the duties of a director of said corporation until he resigned as a director of said corporation, on or about February 15, 1965.

20. That on or about August 30, 1960, Donald J. Less, who is a son of the plaintiff Joseph F. Less, entered the

employ of the defendant Taber Instrument Corporation, as a project engineer, pursuant to a written contract of employment.

21. That for some years prior to 1965, Donald E. Joslyn, who is a son-in-law of the plaintiff Joseph F. Less, and Stanley C. Less, who is a brother of the plaintiff Joseph F. Less, were also employees of the defendant Taber Instrument Corporation.

22. That for many years prior to 1965, the defendant Taber Instrument Corporation was engaged in the research, development, manufacture and distribution and sale of precision machinery, equipment and instruments of various kinds.

23. That in and about the year 1954, the defendant Taber Instrument Corporation began the research and experiment upon, development, manufacture and eventual sale and distribution of pressure transducers, which are instruments for the electrical measurement of fluid pressure of liquids and gases.

24. That from the original date of his employment in 1960, the aforesaid Donald J. Less was assigned by the defendant Taber Instrument Corporation as a project engineer, in the research, experiment, development and production of transducers, under the direction of the defendant Ralph F. Taber, who was President and chief engineer of the defendant Taber Instrument Corporation; and that the duties of the said Donald J. Less were chiefly the application and testing of theories, ideas and designs of said pressure transducers, which were submitted to the said Donald J. Less by the defendant Ralph F. Taber.

25. That between 1954 and 1965, the mechanical parts of said pressure transducers, which had been designed and developed by the defendant Taber Instrument Corporation as

aforesaid, were manufactured under the supervision of the plaintiff Joseph F. Less, as plant manager and Vice-President of Taber Instrument Corporation.

26. That the design, research, experiments, development and manufacture of the aforesaid pressure transducers by the defendant Taber Instrument Corporation involved the knowledge and use of certain valuable trade secrets, secret processes, patterns, devices, information and knowledge, to all of which the plaintiff Joseph F. Less and the said Donald J. Less had access and knowledge of which they acquired by reason of their employment by the defendant Taber Instrument Corporation, as aforesaid.

27. That by reason of the said employment by the defendant Taber Instrument Corporation, and by reason of the fact that the plaintiff Joseph F. Less was an officer and director of Taber Instrument Corporation, as aforesaid, a fiduciary relationship existed between the plaintiff Joseph F. Less and the said Donald J. Less and the defendant Taber Instrument Corporation.

28. That on or about January 11, 1965, the plaintiff Joseph F. Less, the said Donald J. Less, the said Donald E. Joslyn and others, caused and brought about the incorporation of Viatran Corporation, a domestic corporation, the principal office and place of business of which was located at No. 405 Rhode Island Street in the City of Buffalo, New York, within the Western District of New York.

29. That at all times herein mentioned, the plaintiff Joseph F. Less, together with the said Donald J. Less and

Donald E. Joslyn, were and are the principal stockholders, as well as officers and directors of the said Viatran Corporation.

30. That at all times herein mentioned, the said Viatran Corporation was and is engaged in the manufacture, distribution and sale of pressure transducers, among other things.

31. That commencing on or about August 30, 1960, and continuing up to and including the year 1965, the plaintiff Joseph F. Less and the aforesaid Donald J. Less and Donald E. Joslyn, and others, confederated, conspired and agreed among themselves and with other persons and corporations, particularly, the said Viatran Corporation, subsequent to its incorporation, to defraud and deceive the defendant Taber Instrument Corporation, and to illegally divert from the defendant Taber Instrument Corporation, and to procure for their own use and benefit, and for the use and benefit of the said Viatran Corporation, the property rights and business of the defendant Taber Instrument Corporation, in the development, manufacture, distribution and sale of pressure transducers; to compete with the defendant Taber Instrument Corporation, in said business; and to illegally and improperly use the defendant Taber Instrument Corporation's aforesaid trade secrets, secret and confidential information, designs and technical and engineering knowledge acquired as aforesaid by the plaintiff Joseph F. Less and the said Donald J. Less and Donald E. Joslyn, by reason of their employment by the defendant Taber Instrument Corporation; and by reason of the fact that the plaintiff Joseph F. Less was an officer, and director of Taber Instrument Corporation, as aforesaid.

32. That as part of said conspiracy, breach of fiduciary relationship and illegal diversion and misappropriation

of the defendant Taber Instrument Corporation's business, property, rights and trade secrets and confidential information, the plaintiff Joseph F. Less, after leaving the employment of the defendant Taber Instrument Corporation, proceeded to assemble, manufacture, distribute and sell pressure transducers through the said Viatran Corporation and elsewhere, using in connection therewith the designs, trade secrets, secret processes, secret confidential knowledge and information of the defendant Taber Instrument Corporation, which was acquired by the said Joseph F. Less and others, as aforesaid.

33. That for a long time prior to January 29, 1965, the plaintiff Joseph F. Less illegally converted and misappropriated the property of the defendant Taber Instrument Corporation to his own use and benefit, by various means, including the direction of other employees of the defendant Taber Instrument Corporation to perform work, labor and services at the said Joseph F. Less' home and elsewhere, upon Taber Instrument Corporation's time; by charging to the defendant Taber Instrument Corporation's account various materials, work, labor and services furnished and performed by various persons and corporations for the plaintiff Joseph F. Less' individual benefit; and by using the business hours for which he was paid by Taber Instrument Corporation, as well as materials and property of the defendant Taber Instrument Corporation, for the manufacture and construction of various articles of machinery and equipment for the said plaintiff Joseph F. Less' own use and benefit.

34. That on or about August 30, 1965, the defendant Taber Instrument Corporation instituted an action in the

Supreme Court of the State of New York, Erie County, against the plaintiff Joseph F. Less, Donald J. Less, Donald E. Joslyn, Viatran Corporation, and others, for permanent injunction, enjoining and restraining all of the defendants from further manufacturing, distributing or selling pressure transducers, and from the further use of the defendant Taber Instrument Corporation's trade secrets, designs, improvements, engineering skills, confidential knowledge and information relative to the development, manufacture and distribution and sale of pressure transducers, as well as other injunctive relief. The complaint in said action also demanded damages in the sum of $200,000.00, an accounting of large profits alleged to have been made by the defendants in said action in the manufacture, sale and distribution of said pressure transducers. The complaint also demanded judgment in the further sum of $50,000.00 against the present plaintiff Joseph F. Less alone, for conversion of Taber Instrument Corporation's property, as hereinabove set forth.

35. That on or about September 27, 1965, the defendants Viatran Corporation, Joseph F. Less, Donald J. Less and Donald E. Joslyn appeared in said action by their attorneys Coffey, Heffernan and Harrison, and interposed an answer denying the material allegations of the complaint, and setting up certain affirmative defenses with respect thereto.

36. That thereafter, a note of issue was filed in said action and the said action was placed upon the trial calendar of Supreme Court, Erie County.

37. The plaintiff Joseph F. Less, as well as the said Donald J. Less and Stanley Less, as employees of Taber

Instrument Corporation, for some years, were all participants in a certain Profit Sharing Retirement Plan which the defendant Taber Instrument Corporation had established for the benefit of its employees in 1953.

38. That on October 14, 1965, the plaintiff Joseph F. Less instituted an action in the Supreme Court of the State of New York, Erie County, demanding a declaratory judgment that he was entitled to payment of $52,046.35, as benefits under said Taber Instrument Corporation Profit Sharing Retirement Plan.

39. That on October 14, 1965, Donald J. Less instituted an action in the Supreme Court of the State of New York, Erie County, demanding a declaratory judgment that he was entitled to payment of $1,701.89, as benefits under said Taber Instrument Corporation Profit Sharing Retirement Plan.

40. That on October 14, 1965, Stanley C. Less instituted an action in the Supreme Court of the State of New York, Erie County demanding a declaratory judgment that he was entitled to payment of $18,037.69, as benefits under said Taber Instrument Corporation Profit Sharing Retirement Plan.

41. In each of said actions brought by the plaintiff Joseph F. Less, Donald J. Less and Stanley C. Less as aforesaid, in addition to Taber Instrument Corporation, the defendants Ralph F. Taber and Warren J. Hildebrandt "as individuals and as Trustees of the Board and as members of the Profit Sharing Committee of Taber Instrument Corporation Profit Sharing Retirement Plan" were also named as defendants.

42. All of the defendants in the aforesaid three actions appeared by McDonough, Boasberg, McDonough & Beltz, their

attorneys, and in each action interposed an answer denying the material allegations of each plaintiff's complaint, and set up in each action an affirmative defense, alleging, in substance, that neither the plaintiff nor any other employees of Taber Instrument Corporation had made any contribution toward the establishment, administration or financing of the Profit Sharing Retirement Plan; that it was not part of any employment contracts; that the Profit Sharing Retirement Plan was established by Taber Instrument Corporation "for the sole purpose of rewarding its employees for long, loyal and faithful service - - -", and that "loyal, faithful service by the participants - - - - was a condition precedent, express or implied, to the defendants' obligation and agreement to make payments to participants under the terms and conditions of the said Profit Sharing Retirement Plan."

43. In each of the aforesaid three actions, the defendant's affirmative defense further alleged:

> "That for a long time prior to (the date of termination of each plaintiff's employment) the plaintiff failed to render loyal and faithful service to his employer, the defendant Taber Instrument Corporation, but on the contrary, was unfaithful and disloyal to his said employer and to the duties and obligations imposed upon the plaintiff by his said employment"

and that by reason of the breach of a fiduciary relationship existing between each said plaintiff and Taber Instrument Corporation, the plaintiffs were not entitled to any payment or payments as alleged participants in the said Profit Sharing Retirement Plan.

44. In the action instituted by Joseph F. Less, as plaintiff, as aforesaid, with respect to said Profit Sharing Retirement Plan, the defendant's answer set up a counterclaim in the sum of $50,000.00 for the same alleged illegal conversion and misappropriation of the Taber Instrument Corporation's property, which was the basis of the fourth cause of action in Taber Instrument Corporation's aforesaid action in Supreme Court, Erie County, against Joseph F. Less, as a defendant therein.

45. Notes of issue were thereafter filed in each of said actions, and each of said actions was placed upon the trial calendar of Supreme Court, Erie County.

46. Thereafter, the parties to the aforesaid actions pending in Supreme Court, Erie County, and their attorneys, entered into negotiations for the compromise, settlement and discontinuance of all of said actions, which included, as an integral part thereof, negotiations for the purchase of the plaintiff, Joseph F. Less', 14,100 shares of stock in Taber Instrument Corporation.

47. That on or about April 13, 1966, an agreement of settlement and compromise was reached between the plaintiff, Joseph F. Less, and the defendants, Taber Instrument Corporation, Ralph F. Taber and Warren J. Hildebrandt, wherein and whereby Taber Instrument Corporation agreed to discontinue its action against Joseph F. Less, Donald J. Less, Donald E. Joslyn and Viatran Corporation, and others, and to execute and deliver a general release to all of the defendants named in said action,

as well as other persons and corporations, as well as granting the named defendants and other releasees named in said general release, certain further rights with respect to the development, design, production and sale of pressure transducers and other equipment.

48. As a further integral part of said compromise and settlement, the defendants, in the said three actions, arising out of the Taber Instrument Corporation Profit Sharing Plan, to wit, Taber Instrument Corporation, Ralph F. Taber and Warren J. Hildebrandt, individually and as trustees, agreed to pay to the plaintiffs in each of said pending actions, the following amounts in settlement of their claims for benefits under said Profit Sharing Plan:

Joseph F. Less, $51,066.36; Donald J. Less, $1,701.89;
and Stanley C. Less, $18,037.69;

and the three plaintiffs in the said three actions, to wit: Joseph F. Less, Stanley C. Less and Donald J. Less agreed to execute and deliver general releases to Taber Instrument Corporation, Ralph F. Taber and Warren J. Hildebrandt, their successors, assigns, heirs, executors and administrators.

49. That as an integral part of said agreement of compromise and settlement, the defendant Taber Instrument Corporation agreed to purchase the aforesaid shares of stock of the plaintiff Joseph F. Less in Taber Instrument Corporation, to wit, 14,100 shares, at a price of $10.00 per share, in the total amount of $141,000.00.

50. That thereafter and on or about May 4, 1966, as an integral part of said compromise and settlement agreement, the defendant, Taber Instrument Corporation, paid to the plaintiff

Joseph F. Less the sum of $141,000.00 in payment for said 14,100 shares of Joseph F. Less' Class B common stock of Taber Instrument Corporation, and the plaintiff Joseph F. Less duly assigned said shares to Taber Instrument Corporation; said assignment, on information and belief, having been executed on April 13, 1966.

51. That on or about May 4, 1966, as an integral part of said compromise and settlement agreement, Taber Instrument Corporation, Ralph F. Taber and Warren J. Hildebrandt, individually, and as Trustees of the Board and as members of Taber Instrument Corporation Profit Sharing Retirement Plan, paid to Joseph F. Less the sum of $52,046.36; to Stanley C. Less, the sum of $18,037.69 and to Donald J. Less the sum of $1,071.89, as aforesaid.

52. That on or about May 4, 1966, as an integral part of said compromise and settlement agreement, Taber Instrument Corporation and Ralph F. Taber duly executed and delivered to Joseph F. Less, Donald J. Less, Stanley C. Less and Viatran Corporation and others, a general release, as aforesaid.

53. That on or about May 4, 1966, as an integral part of said compromise and settlement agreement, Joseph F. Less, Stanley C. Less and Donald J. Less duly executed and delivered to Taber Instrument Corporation, Ralph F. Taber and Warren J. Hildebrandt, general releases as aforesaid.

54. That on or about May 4, 1966, as an integral part of said compromise and settlement agreement, all of the parties to the four abovementioned actions, then pending in Supreme Court, Erie County, through their respective attorneys, executed and delivered stipulations of discontinuance, discontinuing each of said four actions, "on the merits, with prejudice,

without costs to any party"; and that stipulations of discontinuance were thereafter duly filed in the Erie County Clerk's Office.

AS A SIXTH, SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES UPON
INFORMATION AND BELIEF:

55. Repeats and reiterates each and every allegation in this answer contained in paragraphs numbered 18 through 54 with the same force and effect as if fully set forth herein.

56. That by reason of the premises, the plaintiff Joseph F. Less has accepted and retained consideration and benefits of great value, as part of said compromise and settlement agreement, and has failed to return or restore the consideration and benefits running to the plaintiff, to Donald E. Joslyn, Donald J. Less, to Stanley C. Less, to Vistran Corporation, and to other persons and corporations on behalf of the plaintiff, Joseph F. Less.

WHEREFORE, defendant, Joseph P. D'Angelo, demands judgment dismissing the complaint together with the costs and disbursements of this action.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER

By ROBERT M. HITCHCOCK
Member of the Firm

Attorneys for Defendant,
Joseph P. D'Angelo
Office and Post Office Address
1330 Marine Trust Building
239 Main Street
Buffalo, New York, 14203

Answer of Defendant, Joseph P. D'Angelo, to Cross-Claim of Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt filed June 19, 1967.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB, and
WARREN J. HILDEBRANDT,

Defendants.

ANSWER TO
CROSS-CLAIM

Civil Action
No. 1967-182

Defendant, Joseph P. D'Angelo, by his attorneys, Phillips, Lytle, Hitchcock, Blaine & Huber, as and for his answer to the cross-claim of Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt, alleges:

1. Denies each and every allegation contained in paragraphs numbered 51 and 52 contained in said cross-claim.

AS A SEPARATE AND COMPLETE
DEFENSE THERETO, ALLEGES:

2. That said cross-claim fails to allege a claim upon which relief can be granted.

WHEREFORE, said defendant, Joseph P. D'Angelo demands judgment dismissing said cross-claim together with costs and disbursements.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER

By ROBERT M. HITCHCOCK
Member of the Firm

Attorneys for Defendant,
Joseph P. D'Angelo

Answer of Defendant, Joseph P. D'Angelo, to Cross-Claim of Taber Instrument Corporation, Ralph F. Taber, Benjamin Manasen and Warren J. Hildebrandt filed June 19, 1967.

Office and Post Office Address
1330 Marine Trust Building
239 Main Street
Buffalo, New York, 14203

TO: McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for Taber Instrument
Corporation, Ralph F. Taber,
Benjamin Manasen and
Warren J. Hildebrandt
930 Walbridge Building
Buffalo, New York, 14202

AAk

Notice of pretrial conference on April 2, 1971.

United States District Court
FOR THE
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS

v.

TABER INSTRUMENT CORPORATION, et al.

No. Civ-1967-182

TAKE NOTICE that the above-entitled case has been set for pretrial conference at 2:00 P.M., on April 2, 1971, at Judge John T. Curtin's Chambers, 614 U.S. Courthouse, Buffalo, N.Y.

Date March 11, 1971

John K Adams

John K. Adams, *Clerk.*

By ....,
Deputy Clerk.

To ✓Heffernan, Sweet & Murphy
Louis Loss
Attorneys for Plaintiff

McDonough, Boasberg, McDonough & Beltz
Phillips, Lytle, Hitchcock, Blaine & Huber
Attorneys for Defendants

Notice of pretrial conference on April 2, 1971.

PRETRIAL ORDER - CIVIL CASES

Prior to the date set for pretrial conference by the attached notice, the parties shall mail to the court and to opposing counsel the following:

1. A detailed joint statement of facts.

   (a) In the alternative, each counsel shall submit a detailed statement of fact from his viewpoint of the case. If this course is followed, each side shall submit a statement setting forth what efforts were made with opposing counsel to prepare a joint statement and why a joint statement could not be submitted.

2. A statement of the possible factual and legal issues to be resolved by a trial.

3. A list of exhibits to be used, with a brief description of each. If it is anticipated that an exhibit will be used only to impeach an opposing party's witness, it need not be on the list sent to opposing counsel. However, counsel should inform the court in writing of the exhibit and its possible use.

4. A list of possible witnesses, with a brief resume of their expected testimony. If it is anticipated that a witness will only be used for rebuttal, this information need not be given to opposing counsel, but the court should be informed of the name of the witness and given a summary of the expected testimony.

5. A list of depositions which counsel intends to read at trial.

6. Memorandum dealing with legal problems which may occur.

If the above information is not on hand prior to the pretrial conference, it will not be held and other appropriate action will be taken by the court.

John T. Curtin
JOHN T. CURTIN
United States District Judge

January 27, 1971

Notice To Take Deposition of Teledyne, Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. JESS,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York Corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASHE,
ERVIN HIMMELFARB and
WARREN J. HILDEBRANDT,
Defendants.

NOTICE TO TAKE DEPOSITION

CIVIL ACTION NO.
1967-182

PLEASE TAKE NOTICE that at 10:00 A. M. on May 27, 1971, at 1202 Marine Trust Building, Buffalo, New York, the plaintiff in the above-entitled action will take the deposition of TELEDYNE, INC., through its Chairman and Chief Executive Officer HENRY E. SINGLETON and its Assistant Secretary EDMUND M. KAUFMAN. The deposition will be taken upon oral questions, pursuant to the Federal Rules of Civil Procedure before a Notary Public or any other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed.

Dated: May 17, 1971.

[illegible], [illegible] & MURPHY
Attorneys for the Plaintiff
1202 Marine Trust Building
Buffalo, New York 14203

TO: HAROLD J. BOREANAZ
Attorney for Defendant,
ERVIN HIMMELFARB
736 Brisbane Building
Buffalo, New York 14203

TO: PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for Defendant,
JOSEPH P. D'ANGELO
1330 Marine Trust Building
Buffalo, New York 14203

TO: McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for Defendants,
TABER INSTRUMENT CORPORATION,
RALPH F. TABER,
BENJAMIN MANASSE and
WARREN J. HILDEBRANDT
930 Walbridge Building
Buffalo, New York 14202

Subpoena *Duces Tecum* directed to Teledyne, Inc.

CIVIL SUBPOENA TO PRODUCE DOCUMENT OR OBJECT — A. C. Form No. 48 (Rev. 2-57)

United States District Court

FOR THE

Western District of New York

CIVIL ACTION FILE NO.

JOSEPH F. LESS,

Plaintiff,

vs.

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, ERVIN HIMMELFARB and WARREN J. HILDEBRANDT, Defendants.

No. 1967-182

TO: TELEDYNE, INC.
423 Bryant Street
North Tonawanda, New York 14120

YOU ARE HEREBY COMMANDED to appear by Henry E. Singleton, Chairman and Chief Executive Officer, and by Edmund M. Kaufman, Assistant Secretary, at the offices of Heffernan, Sweet & Murphy* on the 27th day of May, 1971, at 10:00 o'clock A.M. to testify on behalf of JOSEPH F. LESS, the Plaintiff,

in the above entitled action and bring with you all of the documents and things set forth on the attached schedule marked Exhibit "A" and appended hereto.

* 1202 Marine Trust Building
Buffalo, New York

May 17, 1971

HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff
Attorney for

1202 Marine Trust Building
Address

Buffalo, New York 14203

Clerk.

By ____________________ *Deputy Clerk.*

RETURN ON SERVICE

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF ERIE) SS:

EUGENE J. MURPHY, being duly sworn, deposes and says:

That he is above the age of eighteen years. That on May 18th, 1971, at 423 Bryant Street, North Tonawanda, New York, he served this subpoena on the within named TELEDYNE, INC., by delivering personally to and leaving with WARREN J. HILDEBRANDT its General Manager, a true copy thereof, and tendering to said TELEDYNE, INC. the fees for one day's attendance and the mileage allowed by law.

Dated: May 18th, 1971

Eugene J. Murphy

Subscribed and sworn to before me this 18th day of May, 1971.

DAVID L. SWEET
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
My Commission Expires March 30, 1972

David L. Sweet

EXHIBIT "A"

Letters, reports, notes, memoranda, agreements, drafts of agreements, records or other documents, papers or things relating to the following:

1) The acquisition by Teledyne, Inc., of the capital stock, business or assets of Taber Instrument Corporation, including all negotiations with respect thereto, including specifically, but without limitation:

(a) Meetings in February of 1966 in California between Henry E. Singleton, Ralph F. Taber and Joseph P. D'Angelo.

(b) Application for Negotiating Permit filed with the Division of Corporations of the State of California on May 2, 1966.

(c) Preparation and transmission of first drafts of acquisition agreement.

(d) Meeting at Buffalo, New York, in June of 1966 between Henry E. Singleton, Edmund M. Kaufman, representing Teledyne, Inc., and representatives of Taber Instrument Corporation.

2) The acquisition of the stock of Taber Instrument Corporation owned by Joseph F. Less, the plaintiff herein, including all negotiations with respect thereto.

3) The issuance in 1966 of 7,100 shares of Taber Instrument Corporation stock to Ervin Himmelfarb.

4) The issuance in 1966 of 7,000 shares of Taber

Instrument Corporation stock to Joseph P. D'Angelo.

5) The giving of a loan by Ervin Himmelfarb to Taber Instrument Corporation of $100,000.00 on June 3, 1966, the promissory note executed by Taber Instrument Corporation for said loan and the payment of same.

6) The giving of a loan by Ervin Himmelfarb to Taber Instrument Corporation of $29,000.00 on July 7, 1966, the promissory note executed by Taber Instrument Corporation for said loan and the payment of same.

7) The giving of a loan by Benjamin Manasen to Taber Instrument Corporation of $45,000.00 on June 3, 1966, the promissory note executed by Taber Instrument Corporation for said loan and the payment of same.

8) The liquidation of Taber Instrument Corporation, including the distribution of shares of Teledyne, Inc.

Affidavit of David L. Sweet in opposition to application of Teledyne, Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York Corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HINDELFARB and
WARREN J. HILDEBRANDT,
Defendants.

AFFIDAVIT

CIVIL ACTION NO.
1967-182

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

DAVID L. SWEET, being duly sworn, deposes and says:

1) I am an attorney at law duly admitted to practice in the State of New York and in the United States District Court for the Western District of New York and am a member of the firm of HEFFERNAN, SWEET & MURPHY, attorneys for the plaintiff in this action, and I am familiar with the proceedings heretofore had in this action.

2) This affidavit is made in opposition to the application for relief made by TELEDYNE, INC. (hereinafter referred to as "TELEDYNE"), with respect to the subpoena duces tecum addressed to it, which was issued on May 17, 1971, by the Clerk of this Court, pursuant to notice of examination before trial served by the plaintiff.

3) On May 4, 1966, the defendant, TABER INSTRUMENT CORPORATION (hereinafter referred to as "TIC"), purchased 14,100

shares of its stock from the plaintiff, JOSEPH F. LESS.

In this action, brought under §10(b), 27 and 29(b) of the Securities Exchange Act of 1934 (15 U. S. C. §78j(b), 78aa, 78cc(b)) and Rule 10b-5 (17 Code Fed. Regs. §240.10b-5), of the Securities and Exchange Commission, the plaintiff seeks rescission of that sale, on the basis that the defendant, TIC, acting through certain of the defendants named in this action, carried out that purchase without disclosing certain facts material to the value of his stock, namely that active negotiations had taken place and were taking place between representatives of TIC and representatives of TELEDYNE for the acquisition of TIC by TELEDYNE; that those negotiations had resulted in an agreement in principle for the acquisition of the assets of TIC by TELEDYNE at a price greatly in excess of their book value, and that the TELEDYNE shares to be received by TIC, in exchange for its assets, were to be distributed as a liquidating dividend to TIC's shareholders.

4) This action is a companion action to HAAS vs. TABER INSTRUMENT CORPORATION, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MARASKI and WARREN J. HILDEBRANDT, pending in this Court, bearing Civil Action No. 1967-190.

5) The defendants have admitted in their answers that on or about the 30th day of December, 1966, TELEDYNE did in fact acquire the assets of TIC in consideration of 45,000 shares of TELEDYNE stock, which, pursuant to a plan of liquidation and dissolution adopted by TIC at about the same time, were to be

distributed to the shareholders of TIC in proportion to their stock ownership. The defendants' answers also admit that after the purchase of the plaintiff's 14,100 shares TIC transferred those shares to the defendants, ERVIN HIMMELFARB and JOSEPH P. D'ANGELO.

6) The following facts and circumstances bearing upon the request of TELEDYNE for relief from the subpoena served upon it are alleged upon information and belief, the source of this information being examinations before trial of various defendants, conferences with representatives of TELEDYNE and examination of documents produced for examination in the course of this litigation.

7) The defendants, RALPH F. TABER and JOSEPH P. D'ANGELO, have testified that they went to Los Angeles, California, in February, 1966, and met with DR. HENRY E. SINGLETON, then president of TELEDYNE; that while they were there, they entered into an agreement, dated February 3, 1966, written out in longhand on the letterhead of The International Hotel, Los Angeles, California, whereby TIC agreed to pay D'ANGELO a finder's fee of 5% in the event of the acquisition of TIC by TELEDYNE. (A copy of that agreement is attached hereto as Exhibit "A".) D'ANGELO has testified that in the course of that visit discussion was had with DR. SINGLETON concerning possible acquisition of TIC by TELEDYNE, and that he subsequently carried on negotiations with DR. SINGLETON for the acquisition of TIC in March, 1966, at New York City and, at MR. TABER's instructions, told DR. SINGLETON that the price for TIC would be $5,000,000.00;

that DR. SINGLETON suggested D'ANGELO contact some of the stockholders of TIC to see if they would like to sell their stock "because there was no chance of acquisition because of the price difference"; that a prospectus containing facts about TIC was prepared by D'ANGELO for MR. TABER and delivered to DR. SINGLETON at about that same time; that pursuant to DR. SINGLETON's suggestion, D'ANGELO approached MR. LESS, the plaintiff, to see if he would sell his stock.

8) Under date of May 19, 1966, which was 15 days after the purchase of the plaintiff's 14,100 shares of TIC, an agreement was entered into between TABER and D'ANGELO for the transfer to D'ANGELO of 7,000 of the 14,100 shares purchased from the plaintiff, "if approved by DR. SINGLETON". D'ANGELO testified that DR. SINGLETON did in fact approve this transfer of 7,000 shares to D'ANGELO and that the transfer to him was made accordingly.

9) DR. SINGLETON came to Buffalo, New York, in March, 1966, to pursue the negotiations, meeting with D'ANGELO and TABER at the TIC plant. There were subsequent meetings between D'ANGELO and DR. SINGLETON in April or May, 1966, in California. DR. SINGLETON came here again in June of 1966 to meet with the Board of Directors of TIC, its attorney, MR. McDONOUGH, and DR. D'ANGELO. Also present was MR. EDMUND M. KRUGMAN, who was then both counsel to TELEDYNE and also its assistant secretary. They discussed the recent purchase by TIC of the 14,100 shares of the plaintiff, JOSEPH F. LESS, for $141,000.00, and according to the testimony of defendant, BENJAMIN MANASSE, a director of TIC,

DR. SINGLETON said that the stock would have to be reissued and could not be retired.

TELEDYNE was concerned about the manner in which MR. LESS' stock had been purchased without disclosure of the pending negotiations, and insisted upon an indemnification from the parties involved, secured by an escrow fund; a pledge agreement to that effect was executed dated on or about December 8, 1966.

On or about December 30, 1966, the acquisition of TIC by TELEDYNE was consummated and the purchase price of 45,000 shares of TELEDYNE was delivered, with 3,825 shares being turned over to the escrow agent pursuant to the foregoing pledge agreement.

10) The plaintiff first learned of the pending acquisition of TIC by TELEDYNE from a newspaper article which appeared sometime after the purchase of the plaintiff's 14,100 shares. Deponent's firm subsequently inquired of representatives of TELEDYNE regarding the circumstances of the acquisition and were informed that the negotiations preceded the acquisition of MR. LESS' stock, and that in fact an agreement in principle for the acquisition of TIC by TELEDYNE had been arrived at between DR. SINGLETON and RALPH TABER before the purchase of the LESS stock. In exchange for a covenant not to sue executed by MR. LESS, TELEDYNE, through DR. SINGLETON, executed and delivered to MR. LESS an agreement that TELEDYNE would not release the shares held in escrow under the pledge agreement until the final determination of any suit brought by MR. LESS arising out of the

purchase of his stock. DR. SINGLETON also gave a sworn statement confirming that he had personally carried on the negotiations for the acquisition of TIC, and stated that the purchase by TIC of the LESS stock was done without the knowledge or approval of TELEDYNE.

11) It is clear from the foregoing that HENRY E. SINGLETON has direct and personal knowledge of the negotiations which led to the acquisition of TIC by TELEDYNE. Therefore, the designation of DR. SINGLETON as an officer through whom TELEDYNE's testimony is to be taken is entirely reasonable and proper. That testimony is directly relevant and material to the central issue in this suit (and also in the companion suit of JUNIA E. RAAB), i.e., whether the defendants violated Rule 10b-5 in purchasing the plaintiff's stock without disclosing that negotiations were then in progress for the possible acquisition of TIC by TELEDYNE at a substantially higher price.

12) Service of the subpoena in question was duly made in thisdistrict by service on the General Manager of TELEDYNE's TABER INSTRUMENT DIVISION at 423 Bryant Street, North Tonawanda, New York.

13) TELEDYNE is a huge, diversified corporation headquartered in Los Angeles, California, conducting substantial operations throughout the country, including its TABER Division at North Tonawanda, New York. According to the Standard and Poor report of April 28, 1971, TELEDYNE's sales for the fiscal year ending October 31, 1971, will be in excess of 1.22 billion dollars. It has gross assets of nearly 500 million dollars. Deponent is informed and believes that DR. SINGLETON has occasion

to come to New York State from time to time in connection with business of the corporation. It is, therefore, difficult to understand how the attendance of DR. SINGLETON here for the deposition noticed in this case would subject him or TELEDYNE to undue expense or hardship. Furthermore, the inconvenience or expense to DR. SINGLETON and TELEDYNE, in complying with the subpoena, is negligible by comparison with the inconvenience and expense which would be entailed in the taking of the deposition in California, since all seven (7) parties to this suit and their counsel are here in Buffalo, New York, with the sole exception of the defendant, ERVIN [illegible], who resides in Mexico.

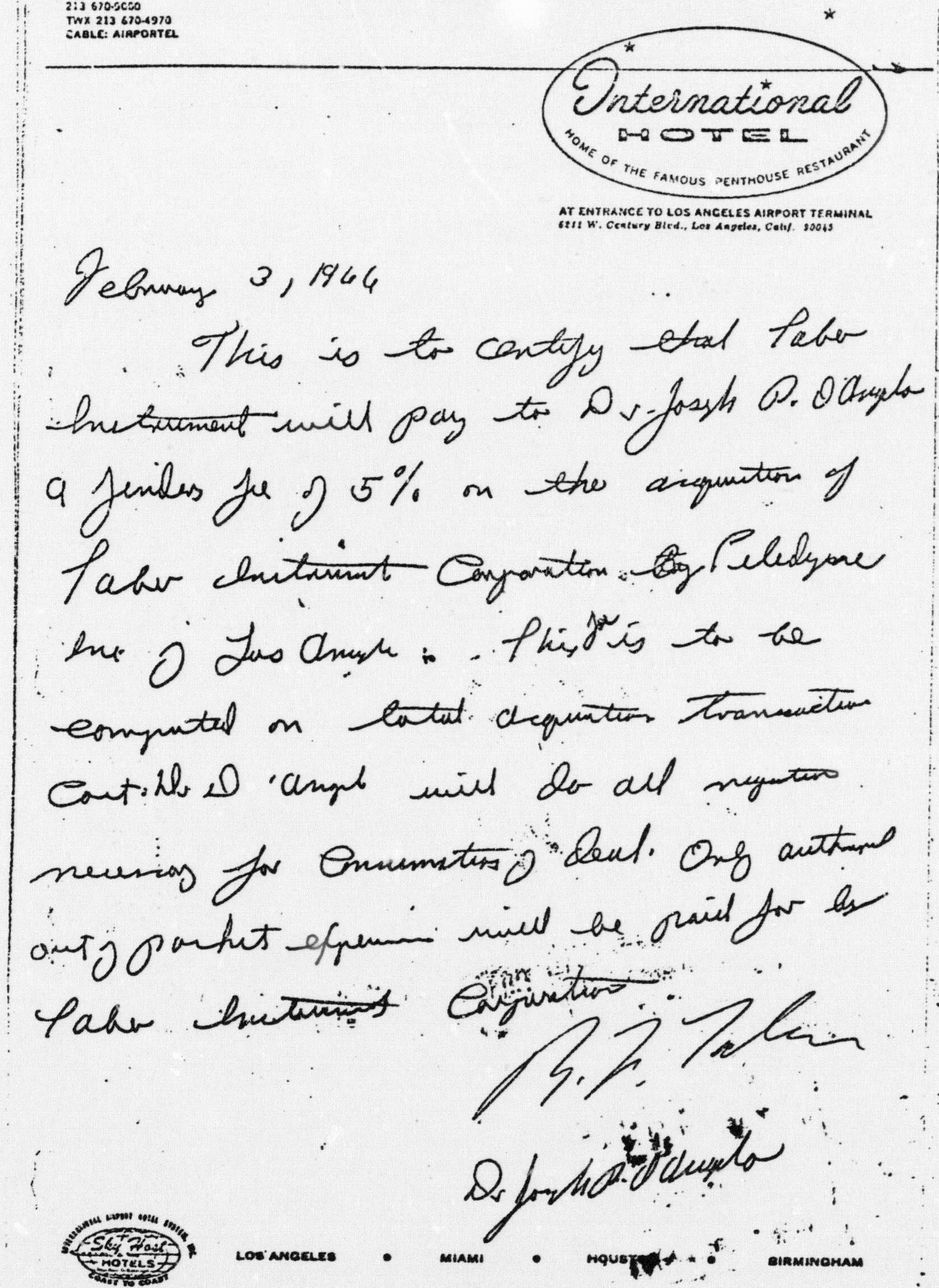
14) The affidavit submitted by TELEDYNE states that EDWARD M. KAUFMAN is no longer an officer of TELEDYNE and it, therefore, appears that TELEDYNE cannot be required to produce him pursuant to the subpoena. However, in view of the important part played both here and in California by TELEDYNE, through DR. SINGLETON, in the matters described and the crucial bearing which they have upon the determination of the issues in this case, the extensive operations of TELEDYNE in New York, including its TABER Division in North Tonawanda, New York, and the disproportionate inconveniance and expense to the parties and their counsel which would be entailed by taking this deposition in California, the application of TELEDYNE to have the subpoena vacated, or for other relief, should be denied, except production of MR. KAUFMAN.

WHEREFORE, deponent respectfully requests that the application of TELEDYNE to be relieved from compliance with the subpoena served upon it be denied.

David L Sweet
DAVID L. SWEET

Subscribed and sworn to before
me this 17th day of June, 1971.

Eugene J Murphy
EUGENE J. MURPHY
Notary Public, State of New York
Qualified in Erie County
My commission expires Mar.30,1972



213 670-9000
TWX 213 670-4970
CABLE: AIRPORTEL

International
HOTEL
HOME OF THE FAMOUS PENTHOUSE RESTAURANT

AT ENTRANCE TO LOS ANGELES AIRPORT TERMINAL
6211 W. Century Blvd., Los Angeles, Calif. 90045

February 3, 1966

This is to certify that Tabor Instrument will pay to Dr. Joseph P. D'Angelo a finders fee of 5% on the acquisition of Tabor Instrument Corporation by Teledyne Inc of Los Angeles. This fee is to be computed on total acquisition transaction cost. Dr D'Angelo will do all negotiation necessary for consummation of deal. Only authorized out of pocket expenses will be paid for by Tabor Instrument Corporation.

B. J. Tabor

Dr Joseph P. D'Angelo

Sky Host HOTELS
COAST TO COAST

LOS ANGELES • MIAMI • HOUST[illegible] • BIRMINGHAM

Exhibit "A"

Proceedings wherein Defendant Himmelfarb nor his Attorneys Appeared at Offices of Heffernan, Sweet & Murphy.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

- -

JOSEPH F. LESS,

Plaintiff,

vs.

TABER INSTRUMENT CORPORATION, a New York Corporation; Ralph F. Taber, Joseph P. D'Angelo, also known as Frank Weber; Benjamin Manasen, Ervin Himmelfarb and Warren J. Hildebrandt,

Defendants.

- -

Proceedings held at 1202 Marine Trust Building, Buffalo, New York, on Thursday, September 9, 1971 at 10 A.M.

APPEARANCES: HEFFERNAN, SWEET & MURPHY, by JAMES P. HEFFERNAN, Esq., Attorneys for Plaintiff.

Proceedings wherein Defendant Himmelfarb nor his Attorneys Appeared at Offices of Heffernan, Sweet & Murphy.

MR. HEFFERNAN: Let the record show that the taking of the deposition of defendant Erwin Himmelfarb was duly noticed for June 7th, 1971 at the offices of Heffernan, Sweet and Murphy, attorneys for the plaintiff, 1202 Marine Trust Building, as appears by the notice dated May 5, 1971, a copy of which with proof of service thereof, is marked Exhibit A, and that said deposition was thereafter and at the request of Harold J. Boreanaz, attorney for the defendant Himmelfarb, adjourned sine die to permit Mr. Boreanaz to move for a protective order.

Let the record further show that Mr. Boreanaz has failed to so move and that under date of August 19, 1971 he was notified by a letter of this firm over the signature of David L. Sweet that the deposition of the defendant Himmelfarb was rescheduled for 10 A.M. on this date, September 9,1971 at the offices of Heffernan, Sweet and Murphy, 1202 Marine Trust Building, attorneys for the plaintiff; that a copy of said letter, and affidavit of mailing of same is marked Exhibit B.

Let the record further show that attorney Charles J. McDonough of the firm of McDonough, Boasberg, McDonough and beltz advised plaintiff's attorneys that he was available and would appear and attend at the deposition should the defendant Himmelfarb appear, and that Robert M. Hitchcock of the firm of Phillips, Lytle, Hitchcock, Blaine and Huber also advised the plaintiffs attorneys of his availability and that he would also appear and attend the defendant Himmelfarb's examination should the same go forward.

Finally, let the record show that neither the defendant Himmelfarb nor his attorneys have appeared or in any way responded to the aforesaid notice

BEST COPY AVAILABLE

and letter communication, and that as of 10:17 A.M. on this date there has been no appearance by the said defendant Erwin Himmelfarb.

(COPY OF NOTICE WITH PROOF OF SERVICE WAS MARKED EXHIBIT A.
COPY OF LETTER OF AUGUST 19, 1971 AND AFFIDAVIT OF MAILING ATTACHED WAS MARKED EXHIBIT B.)

(Proceedings adjourned.)

Order to Show Cause to Strike Answer of Defendant, Ervin Himmelfarb.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB and
WARREN J. HILDEBRANDT,
Defendants.

ORDER TO SHOW CAUSE

CIVIL ACTION NO.
1967-182

Upon the notice to take the deposition of the defendant, ERVIN HIMMELFARB, herein and upon all of the pleadings filed herein and the proceedings heretofore had, and upon the annexed affidavit of DAVID L. SWEET, sworn to October 12, 1971, in support of an order striking out the answer of the defendant, ERVIN HIMMELFARB, and entering judgment by default in favor of the plaintiff and against said defendant, ERVIN HIMMELFARB, for the relief demanded in the complaint, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, for failure of said defendant, ERVIN HIMMELFARB, to appear for the taking of his deposition after being served with a proper notice thereof, and for such other and further relief as the Court may deem just and proper, it is hereby

ORDERED, that the defendant, ERVIN HIMMELFARB, show cause before this Court on the 15th day of October, 1971, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, in Part II, United States District Court, Western District of New York, Buffalo, New York, why an order should not be granted pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, striking the answer of the defendant, ERVIN HIMMELFARB, and granting judgment by default against said defendant, and for such other and further relief as to the Court may seem just and proper; and it is further

ORDERED, that personal service of a conformed copy of this order with supporting affidavit and attachments upon the offices of the attorneys for all parties in this action on or before 5:00 o'clock P. M. on October 12, 1971, shall constitute sufficient service of this order.

Dated: October 12, 1971.

/s/ John T. Curtin
U. S. D. J.

Order to Show Cause to Strike Answer of Defendant, Ervin Himmelfarb.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB and
WARREN J. HILDEBRANDT,
Defendants.

AFFIDAVIT

CIVIL ACTION NO.
1967-182

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

DAVID L. SWEET, being duly sworn, deposes and says:

1. That I am a member of the firm of Heffernan, Sweet & Murphy, attorneys for the plaintiff in this action, and make this affidavit in support of a motion for an order striking out the answer of the defendant, ERVIN HIMMELFARB, and entering judgment by default in favor of the plaintiff for the relief demanded in the complaint against the said defendant, ERVIN HIMMELFARB.

2. That on the 5th day of May, 1971, a notice of the taking of the deposition of the defendant, ERVIN HIMMELFARB, on June 7, 1971, was duly served by mail upon the attorney for said defendant, Mr. Harold J. Boreanaz, a copy of which with affidavit of mailing is attached hereto as Exhibit "A". Shortly before June 7, 1971, the date upon which said deposition was to be taken pursuant to said notice, Mr. Boreanaz contacted plaintiff's

attorneys by telephone and requested that the deposition be adjourned sine die so as to permit him time to make a motion for a protective order. We reminded Mr. Boreanaz that we were under a deadline set by the Court to complete discovery in this case and the related case of HAAS vs. TABER INSTRUMENT CORPORATION, ET AL, and advised him to make such motion promptly.

3. No such motion for a protective order was ever served by Mr. Boreanaz, and several attempts to reach him by telephone concerning the matter were unavailing. Therefore, on August 19, 1971, we sent Mr. Boreanaz a letter rescheduling the taking of the defendant, ERVIN HIMMELFARB's, deposition, pursuant to the aforesaid notice, at 10:00 A. M. on September 9, 1971. A copy of that letter with affidavit of mailing is attached hereto as Exhibit "B". No response to that letter was received.

4. Neither the defendant, ERVIN HIMMELFARB, nor his attorney appeared at the rescheduled time on September 9, 1971, as is more fully set forth in the record of the proceedings on that date made by Carmen S. DePaolo, the officer before whom said deposition was to be taken.

5. That no previous application has been made for the relief requested herein.

WHEREFORE, deponent respectfully requests an order requiring the defendant, ERVIN HIMMELFARB, to show cause why an order should not be granted, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, striking out the answer of the defendant, ERVIN HIMMELFARB, ~~and~~ granting summary judgment in favor of the plaintiff against the said defendant for the relief requested in the complaint, and for such other and further relief as to the Court may seem just and proper.

Subscribed and sworn to before me
this 12th day of October, 1971.

Eugene J. Murphy

EUGENE J. MURPHY
Notary Public, State of New York
Qualified in Erie County
My commission expires Mar.30,1972

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York Corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB and
WARREN J. HILDEBRANDT,
Defendants.

NOTICE TO TAKE DEPOSITION

Civil Action No.
1967-182

PLEASE TAKE NOTICE that at 10:15 A.M. on June 7, 1971, at the offices of HEFFERNAN, SWEET & MURPHY, 1202 Marine Trust Building, Buffalo, New York, the plaintiff in the above-entitled action will take the deposition of the defendant, ERVIN HIMMELFARB. The deposition will be taken upon oral questions, pursuant to the Federal Rules of Civil Procedure before a Notary Public, or any other officer authorized by law to administer oaths. The oral examination will continue from day to day until completed.

PLEASE TAKE FURTHER NOTICE that the said defendant, ERVIN HIMMELFARB, the party to be examined, is requested to produce at the taking of the deposition for inspection and copying the documents and things listed in Exhibit "A" attached hereto and which are in his possession, custody or control.

Dated: May 5, 1971.

HEFFERNAN, SWEET & MURPHY
Attorneys for the Plaintiff
1202 Marine Trust Building
Buffalo, New York 14203

Ex. A. 9/9/71

Order to Show Cause to Strike Answer of Defendant, Ervin Himmelfarb.

TO: HAROLD J. BOREANAZ
Attorney for Defendant,
ERVIN HIMMELFARB
736 Brisbane Building
Buffalo, New York 14203

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for Defendant,
JOSEPH P. D'ANGELO
1330 Marine Trust Building
Buffalo, New York 14203

McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for Defendants,
TABER INSTRUMENT CORPORATION,
RALPH F. TABER,
BENJAMIN MANASEH and
WARREN J. HILDEBRANDT
930 Walbridge Building
Buffalo, New York 14202

EXHIBIT "A"

Letters, reports, notes, memoranda, agreements, drafts of agreements, records or other documents, papers or things relating to the following:

1) The acquisition by Teledyne, Inc., of the capital stock, business or assets of Taber Instrument Corporation, including all negotiations with respect thereto.

2) The acquisition of the stock of Taber Instrument Corporation owned by Joseph F. Less, the plaintiff herein, including all negotiations with respect thereto.

3) The issuance in 1966 of 7,100 shares of Taber Instrument Corporation stock to Ervin Himmelfarb.

4) The issuance in 1966 of 7,000 shares of Taber Instrument Corporation stock to Joseph P. D'Angelo.

5) The giving of a loan by Ervin Himmelfarb to Taber Instrument Corporation of $100,000.00 on June 3, 1966, the promissory note executed by Taber Instrument Corporation for said loan and the payment of same.

6) The giving of a loan by Ervin Himmelfarb to Taber Instrument Corporation of $29,000.00 on July 7, 1966, the promissory note executed by Taber Instrument Corporation for said loan and the payment of same.

7) The giving of a loan by Benjamin Manasen to Taber Instrument Corporation of $45,000.00 on June 3, 1966, the promissory note executed by Taber Instrument Corporation for said loan and the payment of same.

8) The activities or conduct of Joseph F. Less,

Donald Lass, Donald Joslyn and Viatran Corporation alleged in the "Affirmative Defenses" of the answer interposed in this action by Taber Instrument Corporation, et al.

9) The liquidation of Taber Instrument Corporation, including the distribution of shares of Teledyne, Inc.

Order to Show Cause to Strike Answer of Defendant, Ervin Himmelfarb.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

GERALDINE A. SHARRY, being duly sworn, deposes and says that on the 5th day of May, 1971, she served the within Notice to Take Deposition upon the following:

HAROLD J. BOREANAZ
Attorney for Defendant,
ERVIN HIMMELFARB
736 Brisbane Building
Buffalo, New York 14203

and

McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for Defendants,
TABER INSTRUMENT CORPORATION,
RALPH F. TABER,
BENJAMIN MANASEN and
WARREN J. HILDEBRANDT
930 Brisbane Building
Buffalo, New York 14202

by depositing true copies of the same securely enclosed in post-paid wrappers in a Post Office Box regularly maintained by the United States Government at Buffalo, Erie County, New York, directed to said attorneys at the addresses listed above, those being the addresses within the State designated by them for that purpose upon the preceding papers in this action or the places where they then kept offices between which places there then was and now is a regular communication by mail. Deponent is over 18 years of age, is not a party to this action and resides at 111 Edson Street, West Seneca, New York 14210.

Geraldine A. Sharry

Sworn to before me this
5th day of May 1971.

Ruth A. Koeb

[illegible]
in and for the City of Buffalo, New York
My Commission Expires 12/31/72

Order to Show Cause to Strike Answer of Defendant, Ervin Himmelfarb.

August 19, 1971

Mr. Harold J. Boreanaz
Attorney at Law
736 Brisbane Building
Buffalo, New York 14203

Re: Less vs. Taber Instrument Corporation, et al

Dear Mr. Boreanaz:

The taking of the deposition of your client, Mr. Himmelfarb, was duly noticed for June 7, 1971, but at your request, it was adjourned sine die to permit you to make a motion for a protective order, which we understood would be promptly filed.

We have been in touch with your office on several occasions requesting that you make your motion so that we can have a determination and get on with this discovery.

In view of the lapse of time which has occurred without any word from you, we hereby reschedule the taking of Mr. Himmelfarb's deposition, pursuant to said notice, at 10:00 A. M. on September 9, 1971, at our offices.

Very truly yours,

HEFFERNAN, SWEET & MURPHY

By:

DLS:gs
CC: Phillips, Lytle, Hitchcock, Blaine & Huber
McDonough, Boasberg, McDonough & Beltz

Ex. B. 9/9/71 e.w.

Order to Show Cause to Strike Answer of Defendant, Ervin Himmelfarb.

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

GERALDINE A. SHARRY, being duly sworn, deposes and says that on the 19th day of August, 1971, she served the within letter upon the following:

Harold J. Boreanaz, Esq.
736 Brisbane Building
Buffalo, New York 14203

and

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
930 Walbridge Building
Buffalo, New York 14202

attorneys for the defendants by depositing a true copy of the same securely enclosed in a postpaid wrapper in a Post Office Box regularly maintained by the United States Government at Buffalo in said county of Erie directed to said attorneys for the defendants at the above addresses, that being the addresses within the State designated by them for that purpose upon the preceding papers in this action, or the places where they then kept an office between which places there then was and now is a regular communication by mail. Deponent is over eighteen (18) years of age, is not a party to this action and resides at 111 Edson Street, West Seneca, New York 14210.

Geraldine A. Sharry

Sworn to before me this 9th day
of September, 1971.

David L. Sweet

[illegible] L. SWEET
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
My Commission [illegible]

Order to Show Cause to Strike Answer of Defendant, Ervin Himmelfarb.

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE   )

DAVID L. SWEET, being duly sworn, deposes and says that on October 12, 1971, and before 5:00 P. M. of that date, he served a conformed copy of the within Order to Show Cause with attachments upon the following:

Harold J. Boreanaz, Esq.
736 Brisbane Building
Buffalo, New York 14203

and

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
930 Walbridge Building
Buffalo, New York 14202

and

Phillips, Lytle, Hitchcock, Blaine & Huber
Attorneys at Law
1330 Marine Trust Building
Buffalo, New York 14203

by delivering same to their respective offices.

David L. Sweet

Sworn to before me this
14th day of October, 1971.

Ruth A. Kolb

COMMISSIONER OF DEEDS
In and for the City of Buffalo, New York
My Commission Expires 12/31/72

Decision and Order regarding taking of testimony of Henry E. Singleton.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff

-vs-

Civil No.
1967-182

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASEN,
ERVIN HIMMELFARB, and
WARREN J. HILDEBRANDT,

Defendants

APPEARANCES: Heffernan, Sweet & Murphy
(David L. Sweet, of Counsel)
Buffalo, New York, for the Plaintiff.

Hodgson, Russ, Andrews, Woods & Goodyear
(Robert B. Conklin, of Counsel)
Buffalo, New York, for Non-Party Witness,
Teledyne, Inc.

Teledyne, Inc., a non-party foreign corporation concededly doing business in this judicial district, was properly served by plaintiff with a subpoena commanding it to appear in this district for examination through "Henry E. Singleton, Chairman and Chief Executive Officer and . . . Edmund M. Kaufman, Assistant Secretary."

Kaufman is no longer employed by Teledyne, and plaintiff concedes that his presence may not be compelled. Singleton, who is presently Chairman of Teledyne's Board of Directors and based at its Los Angeles, California headquarters, was not personally served with a subpoena. The questions before the court are whether Singleton, a non-party director of a non-party corporation, may be required to submit to examination and, if so, shall he be so required and under what conditions.

Under the present discovery provisions of the Federal Rules of Civil Procedure, the deposition of a corporate party may be taken from a director named in the notice given to the corporation. The director need not be personally subpoenaed, and the corporation must produce him or risk the imposition of sanctions under Rule 37(d). See Advisory Committee's Note to Rule 37 (d), Fed.R.Civ.P., 48 F.R.D. at 542, explicitly overruling the rule and rationale of Campbell v. General Motors Corp., 13 F.R.D. 331 (S.D.N.Y. 1952).

Teledyne's citation of Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., 45 F.R.D.

515 (S.D.N.Y. 1968), does not support its contention that a non-party defendant corporation may not be required to produce a corporate director for examination. The task before Judge Mansfield in that case was not one of defining judicial power but of developing a principle to govern the proper exercise of that power, and he concluded that "[n]o policy considerations compel the conclusion that a corporation with only minimal contacts in this district should be compelled to appear for a pretrial deposition as a non-party witness in a civil case which does not in any way relate to this district." 45 F.R.D. at 518. Judge Mansfield was disturbed that for the mere convenience of counsel a corporate witness from one state was called to a second state for discovery in a case pending in still a third state. Yet he made it clear that by doing business in a particular judicial district, a corporation submits itself fully to the jurisdiction of the court of the district: "A foreign corporation doing business in a district is subject to all process, including subpoena, in the district, and if documents are required in response to a subpoena, the court has the

power to order their production even though they are physically located outside of the jurisdiction." 45 F.R.D. at 516. Far from suggesting that under no circumstances may a subpoenaed non-party corporation be required to produce an individual director named for examination, Elder-Beerman emphasized the great discretion available to the court in supervising discovery under the Rules.

The Rules themselves do not suggest that different principles apply to discovery of party and non-party corporations. Rule 30(a), which governs the taking of depositions upon oral examination, does not distinguish between parties and non-parties; it simply provides that "any party may take the testimony of any person, including a party, by deposition upon oral examination." Fed.R.Civ.P. 30(a) (emphasis added). The provision that "[t]he attendance of witnesses may be compelled by subpoena as provided in Rule 45," Fed.R.Civ.P. 30(a), also connotes no operative distinction between parties and non-parties. The provision is merely intended to assure that the non-party whose testimony is sought submits to examination. There is no necessity for requiring service of a subpoena upon a party since adequate sanctions are provided in Rule 37 in the event that the party fails to respond to a notice to take a deposition.

Having determined that Singleton may be required to appear and to testify in this proceeding, the questions remain, shall this be done and, if so, under what conditions. Under Rule 26(c) this court may issue a broad range of protective orders in discovery proceedings. A claim that Mr. Singleton has no knowledge of any relevant facts should not be allowed to prevent his examination, since plaintiff is entitled to test his lack of knowledge. See Transcontinental Motors, Inc. v. NSU Motorenwerke Aktiengesellschaft, 45 F.R.D. 37 (S.D.N.Y. 1968). Likewise, the fact that Mr. Singleton is a very busy executive should not bar his examination. See Frasier v. Twentieth Century-Fox Film Corp., 22 F.R.D. 194 (D.Neb. 1958). No showing of extraordinary abuse of the discovery process has been made in this case, as in Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., supra, and therefore discovery should not be foreclosed.

But a non-party witness, even more than a party, must be protected against undue burden and expense. See

Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., *supra*; *Inges v. Ferguson*, 282 F.2d 149 (2d Cir. 1960). Therefore, the court does not choose to depart from the ordinary rules that a mere witness will not be required to leave his residence and business and travel great distances for the convenience of the parties, see 4 J. MOORE, FEDERAL PRACTICE, ¶26.70 [1.1], at 26-508 (2d ed. 1970), and that the deposition of a corporation should be taken at its principal place of business. See *id*. ¶26.70 [1.4].

It is therefore the order of this court that the deposition upon oral examination of Henry E. Singleton be taken at the principal place of business of Teledyne, Inc., at a time and date to be arranged by the parties and the witness. Plaintiff is not precluded by this order from utilizing another method of discovery, such as written interrogatories, as a substitute for or preliminary to the taking of the deposition.

So ordered.

John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: October 12, 1971.

Notice of pretrial conference on August 17, 1972.

United States District Court
FOR THE
Western District of New York

JOSEPH F. LESS

v.

TABER INSTRUMENT CORPORATION,
et al.

No. Civil 1967-182

TAKE NOTICE that the above-entitled case has been set for final pretrial conference at 9:30 a.m. , on August 17 , 1972 , at the office of the undersigned, 414 U.S. Courthouse, Buffalo, New York.

It is requested that counsel be in a position to discuss the narrowing of the issues in dispute, the marking of exhibits to be used on the trial, the possibility of settlement of the action, and any other matters which may be of assistance to the Court and counsel in effecting disposition of this proceeding.

Pretrial Statements in accordance with the attached Order are to be filed with the undersigned and opposing counsel at least three days prior to the conference date.

EDMUND F. MAXWELL
United States Magistrate
(716) 842-3416

Dated: July 13, 1972

To: Heffernan, Sweet & Murphy
Attorneys at Law
Attn: Mr. David L. Sweet
1202 Marine Trust Building
Buffalo, New York 14203

Mr. Louis Loss
Attorney at Law
Langdell Hall
Cambridge, Massachusetts

McDonough, Boasberg, McDonough
& Beltz
Attorneys at Law
Attn: Mr. Charles J. McDonough
930 Walbridge Building
Buffalo, New York 14202

Phillips, Lytle, Hitchcock,
Blaine & Huber
Attorneys at Law
Attn: Mr. Robert M. Hitchcock
1330 Marine Trust Building
Buffalo, New York 14203

Mr. Harold J. Boreanaz
Attorney at Law
736 Brisbane Building
Buffalo, New York 14203

Notice of pretrial conference on August 17, 1972.

PRETRIAL ORDER - CIVIL CASES

Prior to the date set for pretrial conference by the attached notice, the parties shall mail to the court and to opposing counsel the following:

1. A detailed joint statement of facts.

   (a) In the alternative, each counsel shall submit a detailed statement of fact from his viewpoint of the case. If this course is followed, each side shall submit a statement setting forth what efforts were made with opposing counsel to prepare a joint statement and why a joint statement could not be submitted.

2. A statement of the possible factual and legal issues to be resolved by a trial.

3. A list of exhibits to be used, with a brief description of each. If it is anticipated that an exhibit will be used only to impeach an opposing party's witness, it need not be on the list sent to opposing counsel. However, counsel should inform the court in writing of the exhibit and its possible use.

4. A list of possible witnesses, with a brief resume of their expected testimony. If it is anticipated that a witness will only be used for rebuttal, this information need not be given to opposing counsel, but the court should be informed of the name of the witness and given a summary of the expected testimony.

5. A list of depositions which counsel intends to read at trial.

6. Memorandum dealing with legal problems which may occur.

If the above information is not on hand prior to the pretrial conference, it will not be held and other appropriate action will be taken by the court.

JOHN T. CURTIN
United States District Judge

January 27, 1971

Notice by D'Angelo to take depositions of David Sweet and Eugene Murphy.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff

vs.

NOTICE TO TAKE DEPOSITIONS

TABER INSTRUMENT CORPORATION, a New York Corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, ERVIN HIMMELFARB and WARREN J. HILDEBRANDT,

Civil Action No. 1967-182

Defendants

PLEASE TAKE NOTICE that at 10:00 A.M. on October 14th, 1972, at 1300 Marine Trust Building, Buffalo, New York, the defendant, Joseph P. D'Angelo, will take the depositions of David L. Sweet and Eugene J. Murphy. The depositions will be taken upon oral questions, pursuant to the Federal Rules of Civil Procedure before a Notary Public, or any other officer authorized by law to administer oaths.

PLEASE TAKE FURTHER NOTICE, that at said time and place said individuals will produce all writings of every nature whatsoever relating to negotiations for the sale and purchase of 14,100 shares, or any part thereof, of Taber Instrument Corporation stock formerly owned by plaintiff herein.

Dated: September 19, 1972

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for defendant, Joseph
P. D'Angelo
Office and Post Office Address
1330 Marine Trust Building
Buffalo, New York 14203

Notice by D'Angelo to take depositions of David Sweet and Eugene Murphy.

TO: McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for Defendants, TABER
INSTRUMENT CORPORATION,
RALPH F. TABER, BENJAMIN MANASEN, and
WARREN J. HILDEBRANDT
Office and Post Office Address
930 Walbridge Building
Buffalo, New York 14202

HAROLD J. BOREANAZ, ESQ.
Attorney for Defendant, ERVIN
HIMMELFARB
Office and Post Office Address
736 Brisbane Building
Buffalo, New York 14203

HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff
Office and Post Office Address
1202 Marine Trust Building
Buffalo, New York 14203

AAz

Notice by TIC *et al.* to take depositions of David Sweet and Eugene Murphy.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS

Plaintiff

-vs-

TABER INSTRUMENT CORPORATION, a New York corporation, RALPH F. TABER, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, ERVIN HIMMELFARB & WARREN J. HILDEBRANDT

Civil Action
No. 1967-182

Defendants

PLEASE TAKE NOTICE that on October 14, 1972, at 10 A.M. at No. 1300 Marine Trust Building, Buffalo, New York, the defendants TABER INSTRUMENT CORPORATION, RALPH F. TABER, BENJAMIN MANASEN and WARREN J. HILDEBRANDT will take the depositions of DAVID L. SWEET and EUGENE J. MURPHY. The depositions will be taken upon oral questions, pursuant to the Federal Rules of Civil Procedure before a Notary Public, or any other officer authorized by law to administer oaths.

PLEASE TAKE FURTHER NOTICE that at said time and place said individuals will produce all writings of every nature whatsoever relating to negotiations for the sale and purchase of 14,100 shares, or any part thereof, of TABER INSTRUMENT CORPORATION stock formerly owned by plaintiff herein.

Dated: September 26, 1972

CHARLES J. McDONOUGH
Attorney for Defendants
TABER INSTRUMENT CORPORATION
RALPH F. TABER
BENJAMIN MANASEN
WARREN J. HILDEBRANDT

TO:

Notice by TIC *et al.* to take depositions of David Sweet and Eugene Murphy.

HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff
1202 Marine Trust Bldg.
Buffalo, N.Y. 14203

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for Defendant Joseph P. D'Angelo
1330 Marine Trust Bldg.
Buffalo, N.Y. 14203

HAROLD J. BOREANAZ, Esq.
Attorney for Defendant Ervin Himmelfarb
736 Brisbane Bldg.
Buffalo, N.Y. 14203

Notice of pretrial conference on December 13, 1972.

United States District Court
FOR THE
Western District of New York

JOSEPH F. LESS

v.

TABER INSTRUMENT CORPORATION, et al.

No. Civ-1967-182

TAKE NOTICE that the above-entitled case has been set for final pretrial conference at 9:00 a.m., on December 13, 1972, at the office of the undersigned, 414 U.S. Courthouse, Buffalo, New York.

It is requested that counsel be in a position to discuss the narrowing of the issues in dispute, the marking of exhibits to be used on the trial, the possibility of settlement of the action, and any other matters which may be of assistance to the Court and counsel in effecting disposition of this proceeding.

Pretrial Statements in accordance with the attached Order are to be filed with the undersigned and opposing counsel at least three days prior to the conference date.

EDMUND F. MAXWELL
United States Magistrate
(716) 842-3416

Dated: November 17, 1972

To: Heffernan, Sweet & Murphy
Attorneys at Law
Attn: Mr. David L. Sweet
1202 Marine Trust Building
Buffalo, New York 14203

Mr. Louis Loss
Attorney at Law
Langdell Hall
Cambridge, Massachusetts

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
Attn: Mr. Charles J. McDonough
930 Walbridge Building
Buffalo, New York 14202

Phillips, Lytle, Hitchcock, Blaine & Huber
Attorneys at Law
Attn: Mr. Robert M. Hitchcock
1330 Marine Trust Building
Buffalo, New York 14203

Mr. Harold J. Boreanaz
Attorney at Law
736 Brisbane Building
Buffalo, New York 14203

Notice of pretrial conference on December 13, 1972.

PRETRIAL ORDER - CIVIL CASES

Prior to the date set for pretrial conference by the attached notice, the parties shall mail to the court and to opposing counsel the following:

1. A detailed joint statement of facts.

   (a) In the alternative, each counsel shall submit a detailed statement of fact from his viewpoint of the case. If this course is followed, each side shall submit a statement setting forth what efforts were made with opposing counsel to prepare a joint statement and why a joint statement could not be submitted.

2. A statement of the possible factual and legal issues to be resolved by a trial.

3. A list of exhibits to be used, with a brief description of each. If it is anticipated that an exhibit will be used only to impeach an opposing party's witness, it need not be on the list sent to opposing counsel. However, counsel should inform the court in writing of the exhibit and its possible use.

4. A list of possible witnesses, with a brief resume of their expected testimony. If it is anticipated that a witness will only be used for rebuttal, this information need not be given to opposing counsel, but the court should be informed of the name of the witness and given a summary of the expected testimony.

5. A list of depositions which counsel intends to read at trial.

6. Memorandum dealing with legal problems which may occur.

If the above information is not on hand prior to the pretrial conference, it will not be held and other appropriate action will be taken by the court.

John T Curtin
JOHN T. CURTIN
United States District Judge

July 24, 1972

652

Notice of pretrial conference on February 7, 1973.

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES COURT HOUSE
BUFFALO, NEW YORK 14202

EDMUND F. MAXWELL

Area Code 716
842-3416

January 16, 1973

Heffernan, Sweet & Murphy
Attorneys at Law
Attn: Mr. David L. Sweet
1202 Marine Trust Building
Buffalo, New York 14203

Mr. Louis Loss
Attorney at Law
Langdell Hall
Cambridge, Massachusetts

McDonough, Boasberg, McDonough & Beltz
Attorneys at Law
Attn: Mr. Charles J. McDonough
930 Walbridge Building
Buffalo, New York 14202

Phillips, Lytle, Hitchcock, Blaine & Huber
Attorneys at Law
Attn: Mr. Robert M. Hitchcock
1330 Marine Trust Building
Buffalo, New York 14203

Mr. Harold J. Boreanaz
Attorney at Law
736 Brisbane Building
Buffalo, New York 14203

Re: Less v. Taber Instrument
Civil 1967-182

Gentlemen:

The final pretrial conference originally scheduled for December 28, 1972 has been rescheduled for Wednesday, February 7, 1973 at 9:00 a.m. at the office of the undersigned.

Very truly yours,

EDMUND F. MAXWELL
United States Magistrate

Notice of status report on February 7, 1974.

United States District Court
FOR THE
Western District Of New York

Joseph F. Less

v.

Taber Instrument Co, et al

No. Civ-1967-182

TAKE NOTICE that the above-entitled case has been set for Status Report at Buffalo, N.Y., on February 7, 1974, at 10:00 A.M. Part 2, Hon. John T. Curtin.

Date January 14, 1974

JOHN K. ADAMS, *Clerk.*

By Robert J White, *Deputy Clerk.*

To James P. Heffernan, Esq.
Charles J. McDonough, Esq.
Phillips, Lytle, Hitchcock, Blaine & Huber
Hodgson, Russ, Andrews, Woods & Goodyear
Harold Boreanaz, Esq.

Notice of Motion for Consolidation *(Less and Raab)* (Same as *Raab* No. 19).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASSE,
KEVIN HIMMELFARB and
WARREN J. HILDEBRANDT,
Defendants.

Civil Action No.
1967-182

NOTICE
OF
MOTION
FOR
CONSOLIDATION

JUNIA E. RAAB,
Plaintiff,

vs.

TABER INSTRUMENT CORPORATION,
a New York corporation,
RALPH F. TABER,
JOSEPH P. D'ANGELO, also known
as FRANK WEBER,
BENJAMIN MANASSE and
WARREN J. HILDEBRANDT,
Defendants.

Civil Action No.
1967-190

PLEASE TAKE NOTICE that upon the annexed affidavit of David L. Sweet and upon all the pleadings filed herein and proceedings heretofore had, the undersigned will move this Court at the United States Courthouse, Buffalo, New York, on the 21st day of February, 1974, at 10:00 A. M., or as soon thereafter as counsel can be heard, for an order that the above-entitled actions be consolidated or tried together on the ground that they involve common questions of law and fact and that consolidation will thus avoid expense and delay.

Dated: February 14, 1974

HEFFERNAN, SWEET & MURPHY
1292 Marine Trust Building
Buffalo, New York 14203
(716) 854-5960
and
LOUIS LOSS
Langdell Hall
Cambridge, Massachusetts 02138
(617) 495-4626

Attorneys for the Plaintiffs

TO: CINDY R. TABER
33 Park Lane Court
Williamsville, New York 14221

MARINE MIDLAND BANK - WESTERN
One Marine Midland Center
Buffalo, New York 14203

McDONOUGH, BOASBERG, McDONOUGH & DELFS
Attorneys for the Defendants,
TABER INSTRUMENT CORPORATION
RALPH F. TABER,
BENJAMIN MANASSE and
WARREN J. HILDEBRANDT
930 Walbridge Building
Buffalo, New York 14202

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER
Attorneys for the Defendant,
JOSEPH P. D'ANGELO
3400 Marine Midland Center
Buffalo, New York 14203

HAROLD J. BOREANAZ, ESQ.
Attorney for the Defendant,
ERWIN HINKELMANN
736 Brisbane Building
Buffalo, New York 14203

Notice of Motion for Consolidation *(Less and Raab)* (Same as *Raab* No. 19).

STATE OF NEW YORK)
) SS: **AFFIDAVIT**
COUNTY OF ERIE)

DAVID L. SWEET, being duly sworn, deposes and says:

1. I am an attorney at law and member of the firm of Heffernan, Sweet & Murphy, attorneys for the plaintiffs herein, and am familiar with the proceedings heretofore had in these actions.

2. The plaintiffs in these actions are both former shareholders of Taber Instrument Corporation (TIC) whose shares of TIC were purchased by that corporation in the spring of 1966. TIC bought 14,100 shares of its stock from the plaintiff Less on May 4, 1966, at a price of $10.00 per share; it bought 600 shares of its stock from the plaintiff Raab about a month later, on June 3, 1966, at the price of $8.00 per share. Both actions arise under the Securities and Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission and are based upon the failure of the defendants to disclose to the plaintiffs or their representatives that at the time of the purchase of their shares, negotiations were being carried on for the acquisition of TIC by Teledyne, Inc., at a price greatly in excess of the prices paid the plaintiffs for their TIC shares. The plaintiffs claims that had they been informed of those negotiations they would not have sold their shares for the prices they received.

3. Each of the plaintiffs was, at the time of the purchase of his shares, a former officer and director of TIC

and each was involved in litigation in New York State Supreme Court with TIC and the Trustees of its Profit Sharing Plan, seeking recovery of moneys due him as a former employee under that Plan.

4. In each case, the final negotiations for the purchase of the stock by TIC were carried on by its attorney, Charles J. McDonough, who conducted these negotiations with deponent, as to the Less stock, and with attorney Franklin Ness, as to the Raab stock.

5. In each case, the purchase of the stock by TIC was accompanied by payment to the plaintiff of the amount that he was claiming in the New York action against TIC and the Trustees of its Profit Sharing Plan. The purchase of Less' stock was also accompanied by the exchange of mutual releases and stipulations of discontinuance regarding certain other litigation in State Supreme Court brought by TIC against the plaintiff Joseph F. Less, his son, Donald Less, and brother, Stanley Less, and others (matters unrelated to the stock purchase), and by the payment by the Trustees of the Profit Sharing Plan to said Donald Less and Stanley Less of moneys that they, as former employees of TIC, had claimed from the said Profit Sharing Plan.

6. In the two instant actions, the answers of the defendants contain denials and affirmative defenses, which are, for the most part, virtually identical.

7. Discovery has disclosed that the 14,100 shares purchased by TIC from the plaintiff Less were almost immediately redistributed to other insiders who had knowledge of the Teledyne

acquisition negotiations, namely the defendants D'Angelo and Himmelfarb. The 600 shares purchased by TIC from the plaintiff Raab were, upon information and belief, retired by TIC.

8. Extensive pretrial discovery has disclosed that the defendants concealed from both plaintiffs the fact that representatives of TIC had been conducting negotiations with representatives of Teledyne, Inc., since early February, 1966; that by April 1, 1966, Teledyne had indicated that it would pay $2.5 Million for TIC, which amounted to a price far in excess of the prices paid to the plaintiffs for their shares; that by May 1, 1966, a price of $3.8 Million was being discussed between Teledyne and TIC; that a comprehensive draft agreement for acquisition of TIC by Teledyne for $3.8 Million was sent to a representative of TIC on or about May 6, 1966, and that following further negotiations, an agreement for the acquisition for the $3.8 Million price was executed on July 27, 1966, following authorization by the Board of Directors of TIC on that date; that when Teledyne learned about the aforesaid dealings between TIC and its shareholders Less and Raab, it demanded an indemnification agreement and a pledge of stock as protection against liability to both Less and Raab; that following further negotiations, a supplemental agreement between TIC and Teledyne was entered into amending the July 27, 1966, agreement in certain respects, including amending the pledge agreement by eliminating reference to Raab's 600 shares and limiting the indemnity to liability to Less arising out of the purchase of his 14,100 shares; that the acquisition of TIC by Teledyne for

45,000 Teledyne shares was consummated on December 30, 1966, in accordance with said agreements; that as called for by the aforesaid agreements, the defendants Ralph F. Taber, Ervin Himmelfarb and Joseph D'Angelo each pledged 1,175 shares of Teledyne stock with an escrow agent to be applied against any liability to Less with respect to the purchase of his 14,100 shares of TIC and their resale to Himmelfarb and D'Angelo.

9. It also appears from pretrial examination of the witnesses and documents that actual delivery to TIC shareholders of their Teledyne shares was made on or about May 16, 1967, at which time Teledyne shares were trading on the New York Stock Exchange at upwards of $180.00 per share; that the plaintiff Less, on liquidation of TIC, would have received approximately 3,000 Teledyne shares and the plaintiff Raab approximately 350 Teledyne shares.

10. Both plaintiffs will offer proof at the trial that they would have sold their Teledyne shares in 1967.

11. Both plaintiffs brought timely suits for rescission of the purchases of their TIC stock, tendered restitution of all that they received under the purchase contracts, and asked that they receive on liquidation of TIC their portion of the 45,000 Teledyne shares of the monetary equivalent of that portion.

12. Both cases involve the application of Rule 10b-5 of the S.E.C. making it unlawful by the use of any means or instrumentality of interstate commerce or the mails to make any untrue statement of material fact or to omit to state a material fact in connection with the purchase or sale of any security.

The effect of Section 29b of the Securities and Exchange Act is to render void any contract made in violation of said Rule 10b-5 as regards the rights of any person having violated the rule with respect to such contract.

13. In both of these actions, the defendants have raised as affirmative defenses matters which may be relevant to the question of the nature and amount of the consideration given the plaintiffs for their stock, but which are not relevant to the issue of whether the plaintiffs are entitled to recover by reason of the nondisclosure of the Teledyne negotiations. As to Less, these matters include recitations as to the former state court litigation involving allegations of wrongdoing by Less and others with regard to TIC's trade secrets, misappropriation of property, references to the suits for profit sharing moneys, and allegations that those various actions were settled and moneys paid as a part of the stock purchase transaction. As to Raab also, the defendants have interposed similar allegations and defenses.

14. In view of the important issues of fact and law common to both of these cases and to avoid costly and time-consuming duplication of litigation, these cases should be consolidated for trial.

WHEREFORE, deponent prays for an order that the above-entitled actions be consolidated or tried together, on the ground that they involve common questions of law and fact and that consolidation will thus avoid expense and delay.

Subscribed and sworn to before
me this 14th day of February,
1974.

DAVID L. SWEET

Commissioner of Deeds
In and for City of Buffalo
My Commission Expires 12/31/74

Notice of Motion for Consolidation *(Less and Raab)*
(Same as *Raab* No. 19).

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

DAVID L. SWEET, being duly sworn, deposes and says:

1. That he is not a party to the within actions, is over eighteen (18) years of age and resides at 5011 Pine Ledge Drive, Clarence, New York.

2. That on the 14th day of February, 1974, deponent served the within notice of motion for consolidation upon HAROLD J. BOREANAZ, attorney for the defendant ERVIN HIMMELFARB, by delivering a true copy thereof to Mr. JOHN J. HEFFRON at Mr. BOREANAZ's office at 736 Brisbane Building, Buffalo, New York, in Mr. BOREANAZ's absence.

3. That on the 14th day of February, 1974, deponent served the within notice of motion for consolidation upon McDONOUGH, BOASBERG, McDONOUGH & BELTZ, attorneys for certain of the defendants herein, at their offices at 930 Walbridge Building, Buffalo, New York, by delivering a true copy thereof personally to RICHARD F. McDONOUGH, a partner in said firm.

David L. Sweet

Subscribed and sworn to before me
this 14th day of February, 1974.

James D. Heffernan

[illegible] HEFFERNAN
Notary Public, State of New York
Qualified in Erie County
My commission expires Mar. 30, 1975

Notice of Motion for Consolidation ***(Less and Raab)***
(Same as *Raab* No. 19).

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

GERALDINE A. SHARRY, being duly sworn, deposes and says:

1. That she is not a party to the within actions, is over eighteen (18) years of age and resides at 111 Edson Street, West Seneca, New York.

2. That on the 14th day of February, 1974, deponent served the within notice of motion for consolidation on the within named MARINE MIDLAND BANK - WESTERN at 2800 Marine Midland Center, Buffalo, New York, by delivering personally to and leaving with JOSEPH F. MEIER, JR., its Vice President, Trust Department, a true copy thereof.

3. That on the 14th day of February, 1974, deponent served the within notice of motion for consolidation upon PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, attorneys for the defendant JOSEPH P. D'ANGELO herein, by delivering personally a true copy thereof to Mr. EDWARD M. GRIFFITH, JR., a partner, at their offices at 3400 Marine Midland Center, Buffalo, New York.

Geraldine A. Sharry

Subscribed and sworn to before me
this 19th day of February, 1974.

James P. Heffernan

JAMES P. HEFFERNAN
Notary Public, State of New York
Qualified in Erie County
My commission expires Mar. 30, 1975

Notice of Substitution of Edward D. Siemer, Esq. as counsel.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,
v.
TABER INSTRUMENT CORP.
RALPH F. TABER
JOSEPH P. D'ANGELO
BENJAMIN MANASEN
ERVIN HIMMELFARB
WARREN J. HILDEBRANDT,
Defendants.

Civil No. 1967-182

NOTICE

SIRS:

PLEASE TAKE NOTICE, that the attorney of record for Ralph F. Taber, the defendant in the above entitled action, and his successor in interest, the Estate of Ralph F. Taber, has been changed, and that Falk, Siemer, Glick, Tuppen & Maloney, with offices located at 2200 Main Place, Buffalo, New York, has been substituted as attorney for Ralph F. Taber, the defendant, by consent filed with the clerk of the court on the 21st day of February, 1974, and that Edward D. Siemer, Esq. hereby appears for the said defendant and demands that all papers in this action be served upon him at his said office.

Dated: February 21, 1974.

Edward D Siemer

Edward D. Siemer,
Attorney for Defendant,
Estate of Ralph F. Taber
2200 Main Place
Buffalo, New York
852-6670

TO: David Sweet
Heffernan, Sweet & Murphy
1202 Marine Trust Building
Buffalo, New York 14203

Robert M. Hitchcock
Phillips, Lytle, Hitchcock, Blaine & Huber
1330 Marine Trust Building
Buffalo, New York 14203

Harold J. Boreanaz
Boreanaz, O'Shea & NeMoyer
736 Brisbane Building
Buffalo, New York 14203

Charles J. McDonough
McDonough, Boasberg, McDonough & Beltz
930 Walbridge Building
Buffalo, New York 14202

Notice of Substitution of Edward D. Siemer, Esq. as counsel.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,
Plaintiff,
v.

TABER INSTRUMENT CORP.
RALPH F. TABER
JOSEPH P. D'ANGELO
BENJAMIN MANASEN
ERVIN HIMMELFARB
WARREN J. HILDEBRANDT,
Defendants.

Civil No. 1967-182

CONSENT TO CHANGE
OF ATTORNEY

We, the undersigned, do hereby consent and agree that that the attorney of record for defendant Ralph F. Taber, and his successor in interest, the Estate of Ralph F. Taber, be changed and that Falk, Siemer, Glick, Tuppen & Maloney, 2200 Main Place, Buffalo, New York, be substituted as attorney for the Estate of Ralph F. Taber, a defendant herein, in the place and stead of McDonough, Boasberg, McDonough & Beltz, 930 Walbridge Building, Buffalo, New York.

Dated: February 20, 1974

Charles J. McDonough, Esq.
McDonough, Boasberg, McDonough
& Beltz,
Retiring Attorney for Defendant

LD Sheldon

L. D. Sheldon,
Trust Officer
Marine Midland Bank-Western
Executor for Estate of Ralph F. Taber

Edward D Siemer

Edward D. Siemer, Esq.
Falk, Siemer, Glick, Tuppen & Maloney
Substituted Attorney for Defendant

Notice of Substitution of Edward D. Siemer, Esq. as counsel.

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

On this 20th day of February, 1974, before me personally appeared L. D. Sheldon, to me known, and known by me to be the same person who executed the Consent to Change of Attorney and acknowledged to me that he executed the same.

Lillian R. Nye
Notary Public

LILLIAN R. NYE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1974

Order of Dismissal on settlement.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff,

v.

TABER INSTRUMENT CORPORATION,
CINDY R. TABER and MARINE MIDLAND BANK-WESTERN,
Executors of the Will of RALPH F. TABER
JOSEPH P. D'ANGELO
BENJAMIN MANASEN
ERVIN HIMMELFARB
WARREN J. HILDEBRANDT,

Defendants.

Civ.No. 1967-182

ORDER

Pursuant to Rule 66 of the Federal Rules of Civil Procedure, the defendant Taber Instrument Corporation, by its receiver Edward J. Carland, has moved for dismissal of the above-entitled action.

This dismissal is brought about by a settlement agreement between plaintiff and all defendants which settlement will benefit the Corporation by reducing the number of actions pending against it and permitting it to move forward toward liquidation and dissolution; and which settlement will also

Order of Dismissal on settlement.

benefit the former shareholders of the Corporation by releasing them from any liability or obligation with respect to the transactions that are the subject matter of this action.

The motion for dismissal is granted.

So ordered.

John T. Curtin

John T. Curtin
United States District Judge

~~November~~ , 1974

DECEMBER 3, 1974

Stipulation of Dismissal on settlement.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH F. LESS,

Plaintiff,

v.

Civ. No. 1967-182

TABER INSTRUMENT CORPORATION,
CINDY R. TABER and MARINE MIDLAND BANK-WESTERN,
Executors of the Will of RALPH F. TABER
JOSEPH P. D'ANGELO
BENJAMIN MANASEN
ERVIN HIMMELFARB
WARREN J. HILDEBRANDT,

Defendants.

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, it is hereby stipulated by and between the attorneys for the parties hereto, that the above-entitled action, having been fully settled and compromised, be and hereby is dismissed with prejudice and without costs.

David L. Sweet

David L. Sweet,
Attorney for Plaintiff
Joseph F. Less

Edward D. Siemer

Edward D. Siemer,
Attorney for Defendants
Taber Instrument Corporation; and
Cindy R. Taber and Marine Midland
Bank-Western, Executors of the
Will of Ralph F. Taber

Stipulation of Dismissal on settlement.

Robert M Hitchcock

Robert M. Hitchcock,
Attorney for Defendant
Joseph P. D'Angelo

Arnold N. Zelman

Arnold N. Zelman,
Attorney for Defendant
Benjamin E. Manasen

Harold J Boreanaz

Harold J. Boreanaz,
Attorney for Defendant
Ervin Himmelfarb

Victor T. Fuzak

Victor T. Fuzak,
Attorney for Defendant
Warren J. Hildebrandt.

Dated: November 5, 1974.

AFFIDAVIT OF SERVICE BY MAIL

RE: Junia E. Raab
vs
Taber Instrument Corp. et al

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 21st day of May, 1976 I mailed ______ copies of a printed Appendix in the above case, in a sealed, postpaid wrapper, to:

10 copies to: A. Daniel Fusaro, Clerk
U.S. Court of Appeals, 2nd Circuit
New Federal Court House, Foley Square
New York, N. Y. 10007

2 copies to: Falk, Siemer, Glick, Tuppen & Maloney
Att: Deanne C. Siemer, Esq.
2200 Main Place, Buffalo, N.Y. 14202

2 copies to: Phillips, Lytle, Hitchcock, Blaine & Huber
Att: Robert M. Hitchcock, Esq.
3400 Marine Midland Center, Buffalo, N.Y. 14202

2 copies to: Brennan, Callahan, Tesseyman, Zelman & Runfola
Att: Arnold N. Zelman, Esq.
1360 Statler Hilton, Buffalo, N.Y. 14202

2 copies to: Hodgson, Russ, Andrews, Woods & Goodyear, Att: Victor T. Fuzak Esq.
1800 One M & T Plaza, Buffalo, N.Y. 14203

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Heffernan, Sweet & Murphy Att: David L. Sweet, Esq.

1202 Marine Trust Bldg., Buffalo, N.Y. 14203

____

Sworn to before me this

21st day of May, 1976

____